SUPREME COURT OF THE UNITED STATES.

No. 244.

LAWRENCE G. GRAHAM AND DONALD D. SCOTT, COMPL'TS AND APPELLANTS,

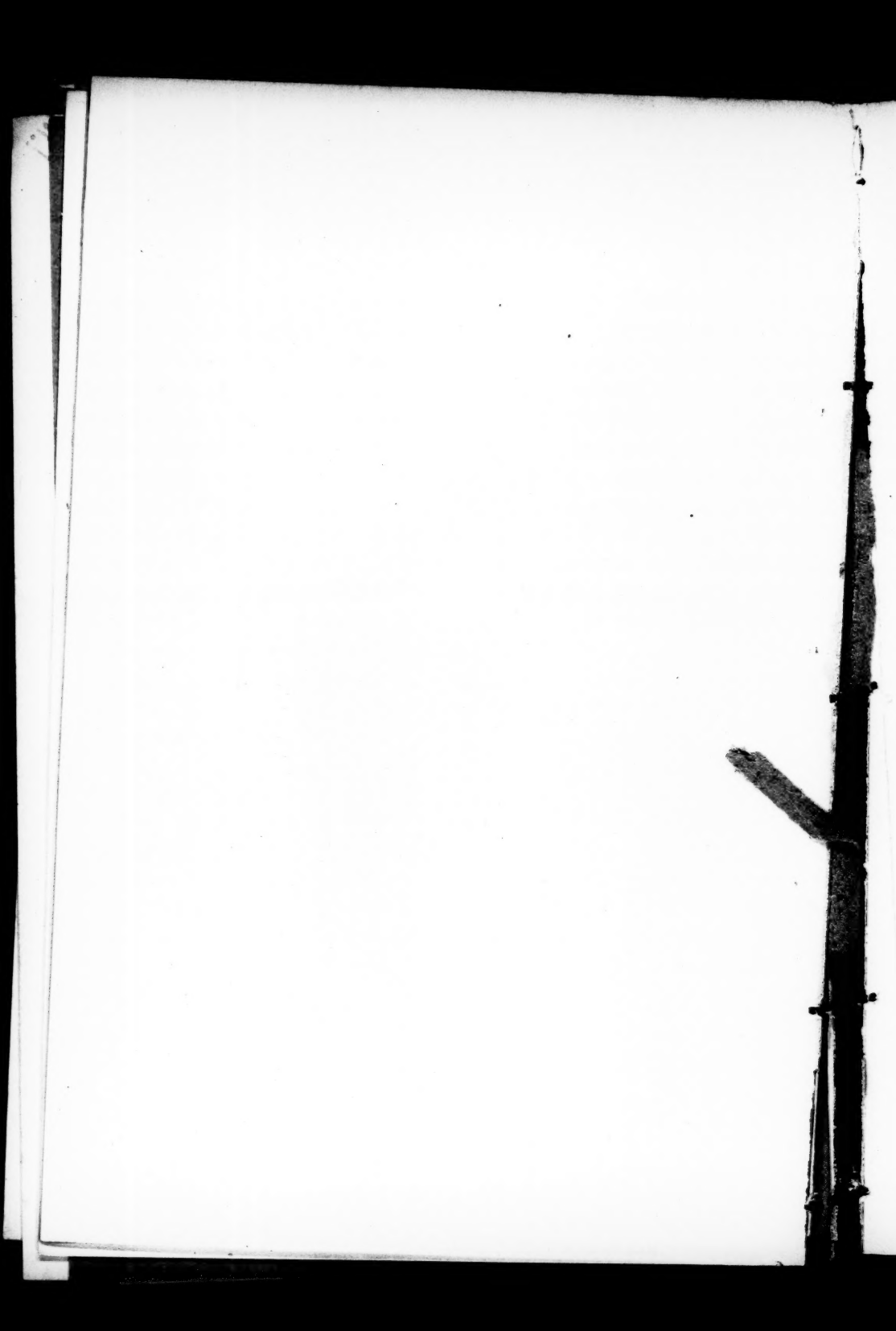
vs.

THE LA CROSSE AND MILWAUKEE RAILROAD COMPANY AND SELAH CHAMBERLAIN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WISCONSIN.

INDEX.

	Original.	Print.
Bill of complaint	2	1
Subpœna	30	17
Return of	31	17
Rule to plead	31	18
Demurrer	32	18
Demurrer sustained and bill dismissed	34	19
Appeal bond, Graham and Scott	35	19
Certificate of clerk	40	21



1 Circuit court of the United States of America for the ninth circuit and district of Wisconsin.

UNITED STATES OF AMERICA, *District of Wisconsin, ss:*

At a stated term of the circuit court of the United States of America for the ninth circuit and district of Wisconsin, began and held according to law on the third Monday (being the eighteenth day) of April, A. D. 1864, at the city of Milwaukee, in said district of Wisconsin.

Present and presiding, the Honorable Samuel F. Miller, associate justice of the Supreme Court of the United States, assigned to said circuit, and the Honorable Andrew G. Miller, district judge; Darius C. Jackson, marshal, and A. Scott Sloan, clerk.

On the tenth day of the term, to wit, on the twenty-eighth day of April, A. D. 1864, the following proceedings were had, to wit:

LAWRENCE G. GRAHAM AND DONALD D. SCOTT, compl'ts,
vs.
THE LA CROSSE AND MILWAUKEE RAILROAD COMPANY and Selah Chamberlain.

Be it remembered, that heretofore, to wit, on the 25th day of June, A. D. 1863, came Lawrence G. Graham and Donald D. Scott, and exhibited
2 and filed their bill of complaint against the La Crosse and Milwaukee Railroad Company and Selah Chamberlain, defendants, as follows, viz:

Bill of complaint.

To the judge of the circuit court of the United States for the ninth circuit and district of Wisconsin, in equity:

Lawrence G. Graham and Donald D. Scott, of Whitewater, in the State of Wisconsin, aliens, subjects of her majesty the queen of Great Britain and Ireland, bring this their bill of complaint against the La Crosse and Milwaukee Railroad Company, a corporation created by and still existing under the laws of the State of Wisconsin, and Selah Chamberlain, of Cleveland, in the State of Ohio, a citizen of the State of Ohio. And thereupon your orators complain and say that the said La Crosse and Milwaukee Railroad Company, being largely indebted unto your orators, Lawrence G. Graham and Donald D. Scott, on the first day of December, 1857, did on that day, for value received, duly execute and deliver to said Graham and Scott its three promissory notes in writing, all dated the day and year last aforesaid, one for the payment of the sum of ten thousand dollars, one for the payment of
3 the sum of nine thousand seven hundred and sixty-seven dollars and sixty-seven cents, and the other for the payment of the further sum of ten thousand dollars; all of which said notes for the sums aforesaid, respectively, were there and thereafter held and owned by said Graham and Scott against said company as evidence of a bona fide indebtedness then existing from said company to said Graham and Scott for work and labor done and performed and material furnished by said Graham and Scott for and to said company in and about the construction of said company's railroad, and that after said notes became due and payable according to their terms, the same remaining unpaid, said Graham and Scott commenced an action thereon in the circuit court for the county of Milwaukee, in the State of Wisconsin, against said last-named company, and that such proceedings were thereupon had in said action that afterwards, on the 28th day of November, 1858, in the said circuit court, before the judge thereof, said Graham and Scott recovered judgment in said action upon said three promissory

notes against said last-named company for the sum of twenty-nine thousand eight hundred and twenty dollars and seventy-one cents, damages and costs, which said judgment was duly docketed in said court on the day and year last aforesaid.

Your orators further show that said last-named company being, on
4 the 1st day of October, 1857, further justly indebted to said Graham and Scott in the further sum of ten thousand dollars for work and labor done and performed and materials furnished by them for said company in the construction of their said railroad, did, on the day and year last aforesaid, make, execute, and deliver to said Graham and Scott its certain other promissory note in writing for the sum of ten thousand dollars, and that after said note became due and payable the same remaining unpaid, the said Graham and Scott commenced an action thereon in the circuit court of the State of Wisconsin in and for the county of Milwaukee, in said State, and that such proceedings were thereupon had that afterwards, on the 21st day of September, 1858, in the said circuit court, before the judge thereof, said Graham and Scott recovered judgment therein against said last-named company for the sum of eleven thousand one hundred and eighty-eight dollars and fifteen cents, damages and costs; which said judgment was on the day and year last aforesaid duly entered and docketed according to law, as by the record of both said last-named judgments remaining in said circuit court, reference being had thereto, will appear.

Your orators further show that afterwards, in the month of December,
1857, the said last two judgments remaining unpaid, unreversed, and
5 unsatisfied to the full amount thereof, respectively, said Graham and Scott commenced an action thereon, the law side of the district court of the United States for the district of Wisconsin against said La Crosse and Milwaukee Railroad Company, and caused said last-named company to be duly served with process therein, and that such proceedings were thereupon had that on the eleventh day of January, A. D. 1860, in the said district court, before the judge thereof, said Graham and Scott recovered a judgment against said last-named company for the sum of forty-four thousand four hundred and thirteen dollars and eighteen cents, ($44,413 18,) which judgment, duly entered and docketed on the day and year last aforesaid, still remains unreversed, unpaid, and unsatisfied, as by the record thereof, remaining in said district court, reference being thereto had, will appear.

Your orators further show that the said La Crosse and Milwaukee Railroad Company heretofore, to wit, on and before the 26th day of September, A. D. 1857, was greatly embarrassed and in failing circumstances; that some of the creditors of said company had before that time commenced suits against said company, and others of its creditors were threatening to do so, and the said company was unable to pay its debts and prosecute the completion of its said railroad, which was then only completed and in operation
from the city of Milwaukee to or near New Lisbon in said district;
6 and that the said company then and there, designing and intending to hinder, delay, and defraud its creditors, and to hold its creditors at defiance and apply its revenue and means to the completion of its said road, did pretend to make, and in form did make, execute, and deliver to said Selah Chamberlain a pretended deed or lease, which is hereto attached and marked "Exhibit No. 1," and hereby made a part of this bill.

And your orators further show that after the making and delivery of said last-named deed or lease to the said Chamberlain as aforesaid, to wit, on the day and year last aforesaid, the said Chamberlain entered into possession of all the property, franchises, and other things mentioned and described in said deed or lease. Your orators further show that the said La Crosse and Milwaukee Railroad Company had no legal right or competent authority to

make or deliver said deed or lease; that the making and delivery thereof were acts beyond the corporate powers of said company, and were therefore of none effect and void, and that the same were and are void as to all creditors of said company and as to your orators, for the further reason that the said deed or lease was made, executed, and delivered, as your orators charge the fact to be, by said company with the intent and design on the part of said company and on the part of its board of directors, to thereby hinder, delay, and defraud its creditors, and particularly Vose, Livingston & Co., creditors of said company, and with intent to hinder and delay said
7 Vose, Livingston & Co. from asserting their just claims and demands in regard to certain railroad iron of great value, to wit, the sum of one hundred thousand dollars and upwards, which intentions and designs of said company were well known to said Chamberlain when said deed or lease was delivered to and accepted by him, which your orators charge the facts to be, and that said Chamberlain accepted said deed or lease and entered into possession as aforesaid for the purpose of aiding and abetting said company in its said unlawful and fraudulent intents and designs aforesaid.

And your orators further show that afterwards, to wit, on the 2d day of October, A. D. 1857, the said La Crosse and Milwaukee Railroad Company and the said Chamberlain, fearing and being advised by the counsel of the said Chamberlain that there was some doubt as to whether the said fraudulent purposes, designs, and intentions of the said company and the said Chamberlain could be accomplished under and by said deed or lease, and that there was some doubt whether said deed or lease would prevent said Vose, Livingston & Co. from enforcing their just demand and claim aforesaid, did, on that day further combine and confederate together to hinder, delay, and defraud the creditors of the said company, and to hinder, delay, and defraud said Vose, Livingston & Co., and prevent them from asserting their claims and enforcing their rights in regard to the said railroad iron, and did
8 then and there agree that said company should, and said company then and there did, to wit, at Milwaukee, in the said district, on said 2d day of October, A. D. 1857, confess and suffer a judgment against it and in favor of said Chamberlain, in the district court of the United States for the district of Wisconsin, without service or process of suit brought, for the sum of six hundred and twenty-nine thousand and eighty-nine dollars and 72 cents damages, and fifteen dollars and 50 cents costs, which said last-named judgment was in form duly confirmed, entered, and docketed in said court; but that said company, when it confessed and suffered said judgment to pass as aforesaid, was not indebted to the said Chamberlain to the amount for which said judgment was rendered, and did not owe and was not indebted to said Chamberlain in any considerable amount, though what was the precise state of accounts between said company and said Chamberlain your orators are not informed and cannot state, but are informed and believe, and therefore state, that said indebtedness was less than fifty thousand dollars; that no consideration or value was ever received by or ever accrued to said company on account of said judgment, and that there was no consideration whatever for said judgment except the small amount of indebtedness aforesaid, and that said judgment was only confessed by said company in pursuance of said unlawful combination and cenfederacy
9 between said company and said Chamberlain, and for the purpose of bolstering up said fraudulent deed or lease, and for the purpose and with the intent and design on the part of said company and its board of directors and said Chamberlain to thereby hinder, delay, and defraud the creditors of said company, and particularly Vose, Livingston & Co.

Your orators further show that the said deed or lease, in its operation and legal effect, until the same was set aside as hereinafter stated, operated

greatly to embarrass and unreasonably to hinder, delay, and defraud the creditors of said company in the enforcement of their just claims and demands against said company, and created and continued trusts for the benefit of said company to an unlimited amount, and enabled said company, through said Chamberlain, as its pretended lessee, to carry on and prosecute its business for its own benefit, and in defiance of its creditors, and enabled said company to enjoy and receive benefits and advantages from its said property, while its creditors were thereby unreasonably hindered, delayed, and prevented from enforcing collection of their just debts against said company out of said property and things conveyed in said lease, and the rents, revenues, income, and tolls arising therefrom, and from the use and operation thereof; and that for these reasons the said deed or lease to said Chamberlain and said judgment confessed in aid of and to bolster up said lease were void in law, without regard to the intentions and designs,
10 with which in fact said lease was given and judgment confessed, as hereinbefore stated.

And your orators further show that the said Chamberlain falsely and fraudulently pretends that said company was, at the time when said deed or lease was made, executed, or delivered, and said judgment confessed as aforesaid, indebted to him, said Chamberlain, in the amount for which said judgment was confessed, on account of and for certain work done, and labor performed, and materials furnished before that time, by said Chamberlain for said company in completing its said road; but your orators are informed and believe that upon a fair, just, and equitable accounting and settlement between said Chamberlain and said company in that behalf, the said company would not have been found at that time indebted to said Chamberlain.

Your orators further show that while said Chamberlain was in possession of said road and other things under said deed or lease, and after the confessing and docketing of said judgment in his favor, to wit, on the 3d day of October, A. D. 1857, one Newcomb Cleveland recovered judgment against said La Crosse and Milwaukee Railroad Company in the said district court of the United States for the district of Wisconsin, for the sum of one hundred and eleven thousand seven hundred dollars and seventy-one cents dam-
ages and costs, and that afterward said Cleveland caused a writ of
11 fieri facias to be issued on said judgment and delivered to the marshall of said district in due form of law, who afterwards made return thereto that he could find no property whereon to levy said execution; that afterwards, on the 31st of October, A. D. 1857, said Cleveland exhibited on the equity side of said district court, his bill of complaint against said La Crosse and Milwaukee railroad company and Selah Chamberlain and others, defendants; that said Cleveland in his said bill of complaint, a copy of which through the stating part thereof is hereto attached, and marked Exhibit No. 2, and made a part of this bill, showed and charged that said judgment in his favor was wholly unsatisfied; that a writ of fieri facias had been issued and duly levied upon certain property therein described, and prayed the aid of said district court in equity to enforce the collection of his said judgment against the said property of said company, and also showed to said court that the said deed or lease and said judgment given and confessed to said Chamberlain, hereinbefore mentioned, were made and confessed with intent to thereby hinder, delay, and defraud the creditors of said company, and prayed the said court that the said deed or lease and said judgment to said Chamberlain might be by said court declared to be null and void; that upon said bill suphœna was duly issued and personally served upon both said La Crosse and Milwaukee Railroad Company and said Selah Chamberlain, and
that both said Chamberlain and said last-named company appeared in
12 said suit in equity, in favor of said Cleveland, and put in their answers thereto, denying that said deed or lease and said judgment

given and confessed to said Chamberlain, hereinbefore mentioned, were given and confessed with intent to thereby hinder, delay, and defraud the creditors of said company, and that said Cleveland took issue upon said answers of said company and said Chamberlain by filing replications thereto, and that thereupon in that suit testimony was taken upon said issue thus made, as to the intent with which said deed or lease was given, and said judgment confessed to said Chamberlain, and as to the true state of accounts between said company and said Chamberlain, and that after a full hearing on the merits in said suit, and upon the precise issue raised therein as to the validity of said lease and judgment to said Chamberlain, between said Cleveland and said company and said Chamberlain, the said district court in equity, having full jurisdiction of the subject matter and parties in said suit, afterwards made a final decree, a copy of which is hereto attached, marked Exhibit No. 3, and made part of this bill, and your orators beg leave to refer to the record in said suit remaining in this court as the same may become necessary.

Your orators further show that after said decree was made and rendered by said court, as hereinbefore stated, and about the 2d day of March,
13 A. D. 1859, the said Chamberlain purchased said judgment in favor of said Cleveland, and procured from the solicitor of said Cleveland, in said suit in equity, in favor of said Cleveland, a substitution of solicitor in blank, so that said Chamberlain could thereafter control said judgment in favor of said Cleveland, and said suit in equity in favor of said Cleveland for his, said Chamberlain's, exclusive benefit and advantage.

Your orators further show that they are advised, and therefore insist, that the said decree, a copy of which is Exhibit No. 3, hereto attached, having been rendered in a suit in which said Chamberlain and said La Crosse and Milwaukee Railroad Company were both parties, and over which said suit and said parties said court had full and complete jurisdiction, is binding and conclusive upon the said Chamberlain, and has the effect entirely to set aside and annull said lease to all intents and purposes, and did in fact set the same aside and annull it, and did, in fact, vacate, open, and set aside the said judgment so entered and docketed in favor of said Chamberlain, as hereinbefore stated; and that since the entering and enrolling of said decree the said Chamberlain has not been and is not now a judgment creditor of said La Crosse and Milwaukee Railroad Company, and has not since said decree was entered, had or held any lien or incumbrance upon any of the railroad property or franchises of said La Crosse and Milwaukee Railroad Company; and your orators here and now claim the benefit and advantage of
14 said decree, and rely upon the same as conclusion by way of estoppel against said Chamberlain and in favor of your orators, as to all the matters and things therein decreed, and in the precise form and language therein decreed and determined.

But your orators further show that, notwithstanding said decree, and in open violation and contempt of said perpetual injunction therein decreed and contained, the said Chamberlain did, from and after the entering and date of said decree, to wit, the 11th day of February, A. D. 1859, ever until the 1st day of December, A. D. 1859, continue, as he had before been, "using, managing, running, controlling said railroad, and the rolling stock, personal property, together with its appurtenances, and franchises, and everything connected therewith, described in said pretended lease; and did, from the use and operation thereof, thereafter, in fraud of said La Crosse and Milwaukee Railroad Company and its creditors, receive in the month of February, after the date of said decree, a large sum of money, but what precise sum your orators cannot show, and afterwards, in the month of March, 1859, the sum of 1,561 dollars; and in the month of April, 1859, the sum of 575

dollars; and in the month of May, 1859, the sum of 14,025 dollars; and in the month of June, 1859, the sum of 18,175 dollars; and in the month of July, 1859, the sum of 662 dollars; and in the month of August, 1859, the sum of 19,305 dollars; and in the month of September, 1859, the sum of 66,264 dollars; and in the month of October, 1859, the sum of 71,980 dollars; and in the month of November, 1859, the sum of 18,446 dollars; all of said sums
15 being nett earnings, and moneys accruing from the rents, tolls, and income of said railroad company, and which said Chamberlain received without shadow of right, and without any claim thereto; and all of which money the said Chamberlain holds in trust for the said railroad company or its creditors, and all of which money the said Chamberlain ought to pay over to be applied in satisfaction of your orators' said judgment rendered in said district court.

And your orators further show into your honors that there is now actually and equitably due to your orators upon the aforesaid judgment in said district court, the whole amount thereof, together with interest thereon from the 11th day of January, one thousand eight hundred and sixty, over and above all just claims, by way of set-off or otherwise.

And your orators show unto your honors that they have reason to believe, and do believe, that the said Chamberlain has equitable interests, things in action, or other property or money of the value of upwards of one hundred thousand dollars, exclusive of all prior just claims thereon, belonging to said La Crosse and Milwaukee Railroad Company, which your orators have not been able to discover and reach by execution on their said judgment rendered by said district court.

And your orators further show that said Chamberlain pretends that said La Crosse and Milwaukee Railroad Company is largely indebted to
16 him, said Chamberlain, but your orators show the fact to be that such pretence is entirely false, and that the said Chamberlain is largely indebted to said company over and above the money received after said Cleveland decree, and before said 1st day of December, as hereinbefore stated; and that on a just and fair reckoning and accounting between said Chamberlain and said company so it would in fact appear; but your orators are informed and insist that the amount of money so received by said Chamberlain after the date of said decree, and before said 1st day of December, A. D. 1859, which he so received in violation of the perpetual order and injunction of said district court, cannot be held by said Chamberlain to be applied to or upon any general indebtedness he may have or hold against said railroad company.

And your orators further show unto your honors that this bill of complaint is not exhibited by collusion with the said La Crosse and Milwaukee Railroad Company, or said Chamberlain, or for the purpose of protecting the property and effects of the said company or any part thereof against the claims of other creditors, but for the sole purpose of compelling payment and satisfaction of the money due upon the aforesaid judgment rendered in said district court.

To the end, therefore, that the said La Crosse and Milwaukee Rail-
17 road Company and said Selah Chamberlain may, upon their several and respective corporal oaths, full, true, direct, and perfect answer make to all and singular the matters hereinbefore stated and charged, as fully and particularly, paragraph by paragraph, as if the same were here again repeated, and they thereto particularly interrogated; and not only to the best of their respective knowledge and remembrance, but also as to the best of their several and respective information and belief; and that the said defendants may, if they can, show why your orators should not have the relief hereby prayed, and may, upon their several and respective corporal

oaths, and according to the best and utmost of their respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written, they are respectively required to answer; that is to say:

1st. Whether a judgment was not obtained by your orators against said company.

And that the said Chamberlain may be decreed to pay over to be applied in satisfaction of your orators' said judgment rendered in said district court as aforesaid, the said sum of money so received by him as hereinbefore stated between the date of said Cleveland decree and the 1st day of December, A. D. 1859.

May it also please your honors to grant unto your orators a writ of
18 subpœna, issuing out of and under the seal of this honorable court, to be directed to the said La Crosse and Milwaukee Railroad Company and Selah Chamberlain, commanding them, at a certain day and under a certain penalty therein to be inserted, personally to be and appear before this honorable court, then and there to answer all and singular the premises, and to stand to and abide by and perform such order and decree therein as to your honors shall seem agreeable to equity and good conscience; and your orators will ever pray, &c.

MAT. H. CARPENTER, *Sol. for Complainants.*

MAT. H. CARPENTER, *of Counsel.*

19 EXHIBIT No. 1.

Lease.—The La Crosse and Milwaukee Railroad Company to Selah Chamberlain.

Articles of agreement made and entered into by and between the La Crosse and Milwaukee Railroad Company, a corporation duly created and existing under and by virtue of the laws of the State of Wisconsin, party of the first part, and Selah Chamberlain, of the city of Cleveland and State of Ohio, party of the second part, at the city of Milwaukee and State of Wisconsin, the twenty-sixth day of September, in the year of our Lord one *one* thousand eight hundred and fifty-seven.

The said party of the first part in consideration of the undertakings and agreements of the said party of the second part, hereinafter contained, hereby sells and conveys to the said party of the second part all its personal property of every name, kind, and description in the State of Wisconsin, except all such personal property as is used in and is appurtenant to the operation of the Watertown division of the La Crosse and Milwaukee railroad, of which said property an inventory and schedule shall be made and attached hereto so soon as the same can be conveniently done.

And the said party of the first part, in consideration of the said undertakings and agreements of the said party of the second part, hereby leases and lets to the said party of the second part, from and after the thirtieth day of September, in the year 1857, for an indefinite term of time, to be determined in the manner hereinafter specified, its entire railroad and railroad route from the city of Milwaukee, by way of Horicon and Portage City, to the city of La Crosse, together with its right of way, depot grounds, and all buildings, tenements, and fixtures of whatsoever kind or description connected therewith or appurtenant thereto, together with all estate, rights, privileges, and appurtenances, and franchises connected therewith or belonging or incident thereto, subject only to such prior superior liens as may or do exist thereon, and all existing contracts or agreements with any other

company whose railroad connects with the La Crosse and Milwaukee railroad.

It is mutually agreed that the said party of the second part shall from and after the said thirtieth day of September, and until this agreement shall be terminated in the manner hereinafter provided, operate so much of the said railroad as is ready for operation, and from time to time such portions of the same as shall be made ready for operation in such manner as will produce the largest amount of nett receipts. That the said party of the second part shall, during the term aforesaid, keep the said road and all the rolling stock upon the same in good and thorough repair, and that the said party of the second part shall receive and appropriate in the manner hereinafter provided all the receipts or income to be derived from the operation of said railroad.

It is further mutually agreed that the said party of the second part may, if it shall be found for the interest of said company, buy additional rolling stock, and appropriate the recipts of said railroad to the payment of the same.

The said party of the second part hereby undertakes and agrees that he will defray all the current cost and expenses of keeping said railroad and rolling stock in good and thorough repair, and all the cost and expenses of operating the said railroad, and that he will by the fifteenth day of every month, make out and deliver to said party of the first part a correct statement, exhibiting the total receipts and income of said railroad from all sources, during the next preceding month; also the cost and expenses during such month, of rolling stock purchased, and of keeping said railroad and rolling stock in repair, and the cost and expenses of operating said railroad, and also exhibiting the nett receipts from said railroad, after deducting such cost and expenses of rolling stock and repairs and of operating, and that he will at any time, on demand of said company, or its president or secretary, furnish to the person demanding the same a statement in detail of the items of which such statement is composed, and any officer or agent of said company, authorized by said company to do so, shall at any time have the right to examine the accounts of said party of the second part, relating to the repairs of said railroad and rolling stock and to the operating of said railroad.

And the said party of the second part further undertakes and agrees that the said nett receipts, after deducting the cost and expenses of repairs and operating as exhibited by the said monthly statements as aforesaid, shall be appropriated by him in the manner following, to wit:

1. To the payment of all coupons hereinafter to become due upon nine hundred and fifty thousand dollars of the bonds of said company, secured by a first mortgage or deed of trust of said railroad from Milwaukee to Portage City, bearing date June 13th, A. D. 1854, together with the sinking fund provided for by a supplemental mortgage or deed of trust, bearing date February 18, 1856, except such of said coupons as are payable November 1st, 1857, and the sinking fund of twelve thousand dollars, payable November 1, 1857.

2. To the payment of all coupons hereafter to become due on one hundred and fourteen thousand dollars of bonds of the City of Milwaukee, issued to the Milwaukee, Fon du Lac and Green Bay Railroad Company, secured by a second mortgage or deed of trust on a part of said railroad, which mortgage or deed of trust bears date on the first day of September, A. D. 1853.

3. To the payment of all coupons hereafter to become due on two hundred thousand dollars of the bonds of the city of Milwaukee, issued to the La Crosse and Milwaukee Railroad Company, secured by a second mortgage or deed of trust on a part of said railroad, which mortgage or deed of trust bears date the thirtieth day of July, A. D. 1854.

4. To the payment of all coupons hereafter to become due on one million of dollars of the bonds of the said railroad company, secured by mortgage or deed of trust on the railroad of said company from Milwaukee to Portage City, and from Watertown to Midland, bearing date the day of , A. D. 1857.

5. Whatever balance of said nett receipts, as aforesaid, shall remain after the payment of the said coupons and sinking fund, shall be applied by said party of the second part in payment of the amount due or hereafter to become due to him by virtue either of a certain contract between said parties, dated January twentieth, 1857, a supplemental contract between said parties dated April 30th, 1857, or a certain contract between said parties, dated November 20th, 1856, or of a contract modifying said contract entered into between the said parties simultaneously with this contract, except such as may become due for work which shall be hereafter done between New Lisbon and La Crosse, which is to be paid for from the means of the said company other than the same income.

And the said party of the second part further undertakes and agrees that whenever he shall have received from the earnings of the said railroad such sum as by the terms and conditions of the aforesaid contract for the construction of the said railroad, bearing date, respectively, November 20th, 1856, January 20th, 1857, April 30th, 1857, and the one entered into simultaneously herewith, he is or shall be entitled to receive, or whenever at any time the said party of the first part shall pay to him any balance which at such time he shall be entitled to receive, according to the terms and conditions of the said contract, that he will surrender up to the said party of the first part, the quiet and peaceable possession of the whole and every part of the said railroad, together with its right of way, depot grounds, and all buildings, tenements, and fixtures of whatsoever kind or description, connected therewith or appertaining thereto, in good repair, together with all estate, rights, privileges, franchises, and appurtenances connected therewith, or belonging, or incidental thereto, including all the railroad buildings, tenements, fixtures, and appurtenances constructed, and all rolling stock, and other personal property put upon said road by said party of the second part, by virtue of this contract, and that he will reconvey and deliver to said party of the first part all personal property hereby conveyed, which shall not have been worn out, destroyed, or consumed in the construction or operation of the said railroad, and that he will convey and deliver to said party of the first part all personal property which shall have been acquired for said railroad in pursuance of this contract, or with the means derived from the receipts from said railroad, and that he will at such time deliver on the line of said railroad, to said party of the first part, fifteen thousand cords of wood, and that whenever the said party of the second part shall have received as aforesaid such sum as he shall be entitled to, as aforesaid, or whenever such balance shall be paid as aforesaid, this contract shall cease and determine, and from thenceforth it shall be null and void.

In witness whereof, the said party of the first part hath caused these presents to be signed by its president and secretary, and its corporate seal to be hereunto affixed, and the same are signed by the said party of the second part.

Signed, La Crosse and Milwaukee Railroad Company, by—

[L. S.]

BYRON KILBOURN, *President.*
JACKSON HADLEY, *Secretary.*
S. CHAMBERLAIN. [L. S.]

Signed, sealed, and delivered in the presence of—
H. L. PALMER.
THOMAS W. BEAVER.

STATE OF WISCONSIN, *Milwaukee County, ss:*

Be it remembered, that on this twenty-sixth day of September, in the year one thousand eight hundred and fifty-seven, before the subscriber, a notary public, residing in the city of Milwaukee, personally appeared Byron Kilbourn, to me known, who, being by me duly sworn, said that he resides in the city of Milwaukee, Wisconsin; that he is the president of the La Crosse and Milwaukee Railroad Company; that the seal affixed to the annexed instrument is the common and corporate seal of said company, and was affixed thereto by their authority; and that he as president, and Jackson Hadley as secretary, subscribed their names thereto by like authority; and on the same day before me personally appeared Selah Chamberlain, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same freely, for the uses and purposes therein mentioned.

(Signed) H. L. PALMER,
Notary Public, Milwaukee County.

21 EXHIBIT No. 3.

UNITED STATES OF AMERICA,
District of Wisconsin, ss:

At a stated term of the district court of the United States of America for the district of Wisconsin, begun and held according to law, at the city of Milwaukee, in the said district of Wisconsin, on the first Monday (being the third day) of January, A. D. 1859. Present: The Hon. Andrew G. Miller, judge of said court, presiding.

On the twenty-first day of the said term, to wit, on the eleventh day of February, A. D. 1859, the following proceedings were had, to wit:

NEWCOMB CLEVELAND
vs.
THE LA CROSSE AND MILWAUKEE RAILROAD Company, Byron Kilbourn, Moses Kneeland, James Ludington, D. Freeman, and Selah Chamberlain. } In equity.

This day came the parties by their counsel, and on due consideration of the pleadings, proofs, and arguments of counsel, it is thereupon ordered, adjudged, and decreed by the court, that the article of agreement between the La Crosse and Milwaukee Railroad Company and Selah Chamberlain, bearing date the twenty-sixth day of September, eighteen hundred and fifty-seven, whereby said company sold and assigned to said Chamberlain all its personal property, (except such as issued on the Milwaukee and Watertown division of said railroad,) and leased to said Chamberlain their said railroad and appurtenances, rights, franchises, and privileges, be, and hereby is, vacated, annulled, and made void, so that the same shall not hereafter be of any force or effect whatever; and that the said Selah Chamberlain be, and hereby is, perpetually enjoined and restrained from using, managing, running, controlling, or meddling with said railroad, or the rolling stock, personal property, or any of its appurtenances or franchises, or anything connected therewith, under by virtue of said article of agreement.

And it is further ordered, adjudged, and decreed by the court that the judgment of the said Selah Chamberlain against the La Crosse and Milwaukee Railroad Company, entered in this court on the second day of October, eighteen hundred and fifty-seven, for the sum of six hundred and twenty-nine thousand and eighty-nine dollars and seventy-two cents, and all execu-

tions and proceedings thereon, be, and hereby are, vacated, annulled, made void and set aside, so that the same shall have no further effect whatever.

And it is further ordered, adjudged, and decreed by the court that the said defendant, Selah Chamberlain, pay the costs to be taxed, so far as they accrue in this proceeding against him; and that he pay the same within twenty days, or in default thereof an execution be issued against him for the same.

And as the lease and assignment of the said company to D. C. Freeman has expired by its own limitation, it is further ordered, adjudged, and decreed by the court that the defendant D. C. Freeman pay the costs to be taxed, so far as they accrued in this proceeding against him, within twenty days, or in default thereof an execution be issued against him for the same.

And it is further ordered, adjudged, and decreed by the court that the La Crosse and Milwaukee Railroad Company pay the costs to be taxed, so far as they accrued in this proceeding against it, within twenty days, or in default thereof an execution be issued against it for the same.

And it is further ordered that reference be and hereby is made to a master of this court to ascertain and report the annual income of the several lots described in the bill as having been conveyed to Moses Kneeland and James Ludington from the time of their said purchase, together with a statement of the interest thereon. And also to ascertain and report the amount of the actual cost of permanent improvements made on said lots by said Kneeland and Ludington, together with the interest thereon; and also the amount of liens and taxes on said lots that have been paid by the said Kneeland and Ludington, or by C. D. Nash for them, together with interest on the same; and that this bill be retained for further decree and proceedings after the coming in of said report.

It is ordered by the court that in case of appeal by the La Crosse and Milwaukee Railroad Company and Selah Chamberlain, or either of them, a bond to authorize a supercedeas shall be given and filed with sufficient sureties, to be approved by the court or judge, in the penal sum of one hundred and fifty thousand dollars.

A. G. MILLER.

22 EXHIBIT No. 2.

To the judge of the district court of the United States for the district of Wisconsin, in equity:

Newcomb Cleveland, of the State of Illinois, and a citizen of said State of Illinois, brings this his bill against the La Crosse and Milwaukee Railroad Company, a corporate body created and existing by and under the laws of the State of Wisconsin, and Byron Kilbourn, Moses Kneeland, James Ludington, D. C. Freeman, Charles D. Nash, citizens of the State of Wisconsin, and Selah Chamberlain, of the State of Ohio, and a citizen of the State of Ohio, defendants.

And thereupon your orator complains and says that heretofore, to wit, on the 7th day of October, A. D. 1857, in the district court of the United
23 States for the district of Wisconsin, by the consideration and judgment of said court, your orator recovered against the said La Crosse and Milwaukee Railroad Company the sum of one hundred twelve thousand two hundred and seventy-one dollars and seventy-six cents, for the damages he had sustained, as well by the breaches of the said company defendant's several covenants to and with your orator, as for the costs and charges of your orator, by him about his suit in that behalf expended, which were adjudged to your orator in and by

said court, whereof the said company defendant was convicted on the day and year last aforesaid, as by the record of said judgment in the office of the clerk of said court (reference being thereto had, and to which for greater certainty your orator prays leave to refer) will more fully and at large appear.

And your orator further shows unto your honor that said judgment so recovered as aforesaid remaining in full force and unpaid, and the whole amount thereof remaining unpaid and unsatisfied, your orator, on or about the 22d day of October, A. D. 1857, for the purpose of obtaining satisfaction of said judgment sued and prosecuted out of the said district court a writ called a writ of *fieri facias*, directed to the marshal of the said district of Wisconsin, by which said writ the said marshal was commanded that of the goods and chattels of the said La Crosse and Milwaukee Railroad Company defendant, in his district, he should cause to be made the sum aforesaid, recovered as aforesaid by your orator; and that if sufficient goods and chattels could not be found, then to cause the said amount to be made of the lands and tenements of said company, defendant, which it had at the time of docketing said judgment, to wit, on the 7th day of October, A. D. 1857, or at any time thereafter, and was afterwards, to wit, on the 22d day of October, A. D. 1857, delivered to the said marshal to be executed in due form of law; and that afterwards, to wit, on or about the 27th day of October, A. D. 1857, the said marshal levied said writ of *fieri facias* upon the following described property, to wit, at the city of Milwaukee, in said district, that is to say:

The La Crosse and Milwaukee railroad, and all the interest of the La Crosse and Milwaukee Railroad Company therein, with all the franchises, rights, and privileges thereunto belonging and appertaining, including roads, roadways, rights of way, and real estate of every description, roadbeds, tracks, ties, rails, station-houses and buildings and ground, sheds and grounds, engine-houses and grounds, shops and grounds, water-houses and grounds, cars and appurtenances, locomotive engines and appurtenances, more particularly described as follows, viz: One passenger depot, one storehouse, two freight depots, grain platform and shed, blacksmith shop, three tank-houses, machine shop, stationary engine-house, paint shop, lumber house, coppersmith shop, iron-house, blacksmith shop, turntable, circular engine-house, car shop, all in the city of Milwaukee; tank-house, on section
24 12 of said railroad; one ditto, on section 22; passenger and freight depot, at Richfield; one turntable and passenger and freight depot, at Schleissengerville; engine-house, tank-house, and passenger and freight depot, at Hartford; passenger and freight depot, at Rubicon; passenger and freight depot and tank-house, at Woodland; ditto, at Iron Ridge; turntable, passenger and freight depot, engine-house, and tank-house, at Horicon; passenger and freight depot, at Junction; ditto, at Rolling Prairie; turntable, engine-house, tank-house, and passenger and freight depot, at Beaver Dam; passenger and freight depot, and tank-house at Fox Lake; passenger, and freight depot at Cambria; passenger and freight depot, turntable, tank-house, and engine-house, at Midland; passenger and freight depot, turntable, engine-house, and tank-house, at Portage City; together with the grounds upon which such houses and buildings are situated, and which are appurtenant thereto; 21 locomotive engines, 10 first-class passenger cars, 2 second-class; ditto, 4 baggage cars, 164 house freight cars, 120 platform cars, 30 gravel cars, and 17 hand cars. Also all that portion of the La Crosse and Milwaukee railroad known as the Watertown division of said railroad, and all the interest of the said La Crosse and Milwaukee Railroad Company therein, with all the franchises, rights, and privileges thereunto appertaining, including roads, roadways, rights of way, and real estate of every descrip-

tion, roadbeds, tracks, ties, rails, station-houses, buildings and grounds, shops and grounds, water-houses and grounds, engine-houses and grounds, cars and appurtenances, locomotives and appurtenances, also about 45,000 bars of railroad iron, more particularly described as follows, viz: one engine-house, in the city of Milwaukee; one station-house, at the Junction; one ditto and wood-shed, at Pewaukie; one station-house, at Hartland; one ditto, at Pine Lake station; one water-house, one wood-shed, and one station-house, at Oconomowoc; one station-house, frame shed, machine shop, car shop, blacksmith shop, two water-houses, engine-house, and wood-shed, at Watertown; station-house and water-house, at Lowell; station-house, engine and water house, at Columbus; together with the grounds upon which such houses and buildings are situated, or which are appurtenant thereto; 7 locomotive engines, 67 box cars, 35 rack cars, 10 hand cars, 4 passenger cars, and 2 baggage cars, 20 dump cars, about 42,612 bars of railroad iron, lying piled on lots in blocks 40 and 41 in the 2d ward in the city of Milwaukee; also, lots 9, 10, and 11, in block 3, and lots 1, 2, and 3, in block 47, in the 5th ward of the city of Milwaukee; lots 1 and 4, in block 156; lots 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, in block 155; ½ of block 157, except lot 8 and the bayou adjoining said block; ½ of lots 8, 9, and 10, all of lots 12, 13, and 14, ½ of lots 16 and 17, and E. half of 15, in block 158, in the 4th ward of the city of Milwaukee. All of which said property was then and there, to wit, at the time of said levy, situated in said district of Wisconsin, and was the property, goods, chattels, rights, franchises, lands, and property of the said La Crosse Railroad Company, subject to levy of execution, or *fieri facias*, in manner and form as aforesaid; and all of which said property the said marshal afterwards, to wit, on the 30th day of October, A. D. 1857, advertised for sale, at public auction, according to law, to satisfy said writ, to wit, on the 15th day of December, A. D. 1857, at the said marshal's office, in the said city of Milwaukee, in said district, at the hour of 10 o'clock a. m. of that day, as the law in that behalf requires, as by the said writ of *fieri facias*, and the directions and certificate of said marshal thereon indorsed, and now in the hands of the said marshal, will more fully appear, and to which, or a copy thereof, your orator prays leave to refer.

And your orator further shows that the whole of said judgment yet remains unpaid and unsatisfied; and that said judgment remains in full force, unreversed and unannulled, and that no part of the said judgment has been paid to your orator, but that to pay the same, the said defendant company ever has and still does neglect and refuse; and your orator shows that there is now equitably and actually due to your orator on said judgment the sum of one hundred and twelve thousand two hundred and seventy-one dollars and seventy-six cents, together with interest on the sum of one hundred eleven thousand seven hundred and twenty-seven dollars and 71 cents thereof from the day of the rendition of said judgment, as aforesaid, over and above all just claims of the said the La Crosse and Milwaukee Railroad Company defendant, by way of offset or otherwise; and that this bill is not exhibited by collusion with the said the La Crosse and Milwaukee Railroad Company, nor for the purpose of protecting the property, rights, or effects of said company defendant, nor any part thereof, against the claims of other creditors, but for the sole purpose of obtaining the relief hereinafter prayed. And your orator further shows that the said La Crosse and Milwaukee Railroad Company defendant, at Milwaukee, in said district, heretofore, to wit, on the 26th day of September, A. D. 1857, designing and intending to injure, delay, cheat, and defraud the creditors of said company, and to injure, delay, cheat, hinder, and defraud your orator of his just debt and damages against said company, did pretend to make, and in form

did make, seal, execute, and deliver to one Selah Chamberlain, (whom your orator prays may be made a defendant to this bill,) a pretended lease, in and by which said lease, dated the day and year last aforesaid, the said La Crosse and Milwaukee Railroad pretended to, and did express, that it, said company, did sell and convey to said Selah all its personal property, of every name, kind, and description, in the State, district of Wisconsin, except all such personal property as was when used in and was then appurtenant to the operation of what is known and called the Watertown division of the La Crosse and Milwaukee Railroad, and did pretend to, and in said
26 lease did express that it, said company, did, let and lease to said Selah, from and after the 30th day of September, A. D. 1857, for an indefinite term of time, to be determined in the manner thereinafter specified, its, said company's, entire railroad and railroad route from the city of Milwaukee, by way of Horicon and Portage City, to the city of La Crosse, together with its, said company's, rights of way, depot grounds, and all buildings, tenements, and fixtures of whatever kind or description, connected therewith or appurtenant thereto, together with all estate, rights, privileges, and appurtenances, and franchise connected therewith, or belonging or incident thereto, subject only to such prior or superior liens as might or did exist thereon, and all their existing contracts and agreements with any other company whose railroad connects with the La Crosse and Milwaukee railroad; which said pretended lease contained many covenants and agreements between said company and said Selah, intended, as your orator is informed and believes, and therefore says, to make said lease look and seem more specious and circumstantial, and to cover still deeper the fraudulent design of said company in making said lease. And your orator further shows to the court that after the making and delivery to said Selah of said lease as aforesaid to wit, on the day and year last aforesaid, the said Selah entered into possession of all the property, rights, privileges, and franchises described, enumerated, and mentioned in said lease, and ever since has taken and received, and is now taking and receiving, all tolls and profits, income and revenue of said company's said railroad and other property described in said lease aforesaid. Your orator is informed and believes, and therefore so says, that said company had no legal right or competent authority to make said lease; that the same was made to delay and defraud your orator, as a creditor of said company, and is directly in fraud of his rights, and constitutes, in connection with said Selah's possession and claim of title thereto under the same, a cloud upon your orator's right to sell said property, on your orator's said writ of *fieri facias*, and seems to be and is an impediment in the way of your orator's said writ; and that said Selah is now in possession of all the said property, rights, franchises, and privileges, and claims, and pretends to be the absolute owner of all the said personal property so expressed in said lease to be sold to him, said Selah. And your orator further shows that at Milwaukee, in said district, heretofore, to wit, on the 30th day of September, A. D. 1857, the said company, defendant, designing and intending to cheat and hinder, delay and defraud your orator, and the creditors of the said company, did pretend to, and in form did, make, subscribe, seal, and deliver to one D. C. Freeman, whom your orator prays may be made a defendant to this bill, a lease or instrument in writing, in which said lease the said company did pretend to and did express that it did then and there and thereby sell and convey to said Freeman all its personal property of every name, kind, and description, in the State of Wisconsin,
27 used in and appurtenant to the operation of the Watertown division of the La Crosse and Milwaukee Railroad; and said company did therein and thereby also pretend and express, that it did thereby lease and let unto said Freeman, from and after the day and year last aforesaid, for

the term of one year then next ensuing, its entire railroad and railroad route from the city of Milwaukee, by the way of Watertown and Columbus, to Mainland, in the county of Columbia, and commonly called and known as the Watertown division of the La Crosse and Milwaukee railroad, together with its right of way, depot grounds, and all buildings and tenements, of whatever kind and description, connected therewith, or belonging or incident thereto; which said pretended lease contains many mutual covenants between *between* said company and said Freeman.

Your orator says that he is informed and believes, and so says, that said company had no legal authority to make said lease, and that the same was made and delivered by said defendant with intent to delay, hinder, and defraud its creditors, as the said Freeman, when he received the same, to wit, on the 30th day of September, A. D. 1857, well knew. Your orator further shows that said Freeman, immediately after the execution and delivery to him of said lease, did take possession of all the property enumerated in said lease, and ever since has and now does claim to and does receive all tolls, revenue, and profits arising from the property in said lease enumerated, which is part of the property levied on by said marshal under your orator's said writ of *fieri facias*, as hereinbefore stated. And that said lease, which was, on the 2d day of October, A. D. 1857, recorded in the office of the secretary of state of the State of Wisconsin, and the possession and claim of right of said Freeman under said lease, are a cloud upon your orator's right to sell said property on the writ of *fieri facias* issued in his favor as aforesaid, and are an impediment in the way of the execution of said writ. Your orator further shows, that heretofore, to wit, on the 2d day of October, A. D. 1857, (while the trial of the issues joined, in the action in which your orator recovered the said judgment hereinbefore mentioned, was proceeding in said court, and after it had become apparent that your orator would recover a large sum of money in said action,) the said the La Crosse and Milwaukee Railroad Company defendant, intending and designing to cheat and defraud your orator as a creditor of said company defendant; and to prevent your orator from collecting any judgment he might recover in said action, and to delay, hinder, put off, cheat, and defraud the creditors of said company defendant, did, to wit, at the city of Milwaukee in said district, suffer a judgment to pass against it, said company defendant, by confession, in the said district court of the United States for the said district of Wisconsin, in favor of said Selah Chamberlain, without service of process or suit brought, for the sum of six hundred aud twenty-
nine thousand and eighty-nine dollars and seventy-two cents dam-
28 ages, and fifteen dollars and fifty cents costs; in all, for the sum of six hundred and twenty-nine thousand one hundred and five dollars and twenty-two cents, which said judgment, fraudulently suffered as aforesaid, was duly and regularly entered and docketed in said court on the day and year last aforesaid, and appears and seems to be a lien and incumbrance upon all real property of the said defendant company within the said district of Wisconsin, including the real property hereinbefore described and levied upon as aforesaid. Your orator further shows that he is informed and believes, and thereupon he says, that the said company defendant, when it so suffered said judgment to pass by confession in favor of said Chamberlain as aforesaid, was not indebted to said Chamberlain in the sum described and specified in said confession of judgment; and did not owe nor was indebted to said Chamberlain in a sum exceeding the sum of fifty thousand dollars; and that no consideration or value was ever received by or at any time accrued to said company defendant, for said judgment above and beyond the sum of fifty thousand dollars; and that said judgment was by said company defendant suffered and permitted to pass and be entered and docketed as

aforesaid, with the intent thereby to hinder, delay, defraud, and put off the creditors of said company defendant, and particularly to hinder, delay, and defraud your orator, by the pretence that said judgment was a good and valid lien upon all the real property of the said defendant company in said district. And your orator is informed and believes, and therefore says, that the said Chamberlain, when he so received the said lease, and when said judgment was entered up and docketed in his favor as aforesaid, well knew that said company designed and intended thereby respectively to hinder, delay, cheat, and defraud its creditors, and particularly your orator; that said Selah intended when he so received said lease and said confession of judgment, respectively, to thereby respectively injure, defraud, and delay your orator; and that the said Selah has sued out writ of *fieri facias* on said judgment in his favor, and is now threatening to sell under the same the railroad iron levied on by your orator as aforesaid, of great value, to wit, of the value of four hundred and twenty thousand dollars.

Your orator further shows that on or about the 15th day of June, A. D. 1856, the said company defendant was the sole owner, and seized in fee of each and every of the said lots of land, city lots in the city of Milwaukee, in said district hereinbefore particularly described, and on which said marshal has levied your orator's writ of *fieri facias*, as hereinbefore set forth, and that said lands were then and there of great value, to wit, the value of one hundred thousand dollars and upwards; and that Byron Kilbourn, Moses Kneeland, and James Ludington, were three of the directors of said company defendant on the day and year last aforesaid; and that on or about the day and year last aforesaid, while said company defendant was so seized of

29 said land, the said Moses Kneeland and James Ludington were appointed by the board of directors of said company defendant, or by the executive committee of said board, (which said board was composed of the said Kilbourn, said Kneeland, said Ludington, and others,) a committee to sell and dispose of said lands, worth at that time to the said company (as the said Kilbourn, Kneeland, and said Ludington then well knew) more than one hundred thousand dollars; and your orator is informed and believes, and therefore says, that the said Kneeland and said Ludington, then and there designing and intending to injure and defraud said company and its creditors, and disregarding their duty as directors as aforesaid in the premises, and intending unlawfully and fraudulently to acquire to themselves and the said Kilbourn, by a violation of their duty as directors as aforesaid, the said lands for a grossly inadequate price, did sell and transfer said lands, worth, as they then and there well knew, more than one hundred thousand dollars, to one Charles D. Nash for the nominal consideration of twenty thousand dollars, in bonds or stock of said company defendant; but that said Kilbourn, said Kneeland, and said Ludington, or one of them, furnished the said Nash, directly or indirectly, whatever the said Nash pretended to pay to said company for said lands, and that said sale was made to said Nash with the fraudulent secret arrangement and understanding between said Nash and said Kilbourn, said Kneeland and said Ludington, or one of them, that said Nash should thereafter, when requested by said Kilbourn, Kneeland, or Ludington, convey and transfer said lands to said Kneeland, said Kilbourn, or said Ludington, for the benefit of said Kilbourn, Kneeland, and Ludington, for a nominal or no consideration; and that said Nash was wholly disinterested in said pretended sale to him of said land; and that soon after the conveyance of said lands to said Nash that the said Nash did, in pursuance of said fraudulent and corrupt arrangement hereinbefore stated, convey and transfer said lands to said Kneeland for no consideration, or a nominal or pretended consideration; that said Kneeland, soon after the conveyance aforesaid to him, conveyed and transferred to said Lud-

lngton one third of said land for no consideration, or for a nominal and pretended consideration, but really in pursuance of said corrupt agreement; and that said Kneeland now holds a record title to two thirds of said land for himself and the said Kilbourn; that said Kneeland, said Kilbourn, and said Ludington pretend to hold these lands as aforesaid, which are now worth more than two hundred thousand dollars, in fraud of your orator's rights as a creditor of said company, and by reason of a violation of their duty as directors as aforesaid, and trustees of this same property, and that the same ought to be applied to the payment of your orator's said judgment.

30 Whereupon a subpœna issued according to practice of said court returnable on the first Monday of August then next as follows:

Subpœna.

UNITED STATES OF AMERICA, *District of Wisconsin:*

[SEAL] The President of the United States of America to the La Crosse and Milwaukee Railroad Company and Selah Chamberlain, greeting:

You are hereby commanded that you personally appear before the judges of the circuit court of the United States of America for the district of Wisconsin, in our court of chancery in and for the district aforesaid, on the first Monday of August next ensuing, at Milwaukee, to answer to a bill of complaint exhibited against you in our said court by Lawrence G. Graham and Donald D. Scott, and to do further and receive what our said court shall have considered in that behalf; and this you are not to omit under the penalty which may ensue. This process of subpœna is directed to the marshal of this district, who is hereby commanded to serve the same upon the said the La Crosse and Milwaukee Railroad Company and Selah Chamberlain, if to be found in his district, and due return thereof made.

Witness the Honorable Roger B. Taney, chief justice of the Supreme Court of the United States, at the city of Milwaukee, in the said district, this twenty-fifth day of June, in the year of our Lord one thousand eight hundred and sixty-three, and of our independence the eighty-seventh.

J. M. MILLER, *Clerk.*

MATT. H. CARPENTER, *Solicitor.*

[U. S. revenue stamp, 50 cents.]

31 It is ordered by our said court that the said the La Crosse and Milwaukee Railroad Company and Selah Chamberlain, the defendants aforesaid, do enter their appearance in this suit in the clerk's office on or before the day and time at which this subpœna is returnable as aforesaid; otherwise, the bill filed may be taken as confessed.

And afterwards, before the return day of the said subpœna, came the said marshal and returned the same into said court with his return endorsed thereon in writing, as follows:

Return.

Served on the within-named Selah Chamberlain by delivering him personally a copy of this subpœna this 29th day of June, 1863. Served on the within-named La Crosse and Milwaukee Railroad Company by delivering personally to John Lockwood, a director of said company, a copy of this subpœna this 3d day of August, 1863.

D. C. JACKSON, *Marshal,*
By W. S. JACKSON, *Deputy.*

Service	4 00
Travel	12
Copies	80
	$4 92

Rule to plead.

And afterwards, to wit, on the third day of August, A. D. 1863, came the said Lawrence G. Graham and Donald D. Scott, by Matt. H. Carpenter, their solicitor, and entered in the Order and Rule Book a rule on the defendants to plead as follows:

32 LAWRENCE G. GRAHAM AND DONALD D. SCOTT
vs.
THE LA CROSSE AND MILWAUKEE RAILROAD COMPANY and Selah Chamberlain.

On motion of Matt. H. Carpenter, solicitor for the complainants, ordered that the defendants appear and plead answer or demur to the bill of complaint in this cause on or before the 1st Monday of September, A. D. 1863, or an order will be entered taking said bills as confessed. Dated August third, 1863.

Demurrer.

And afterwards, on the 18th day of September, A. D. 1863, came the said Selah Chamberlain, one of the said defendants, and filed his demurrer to the said bill of complaint as follows:

The demurrer of Selah Chamberlain, defendant to the bill of complaint of Lawrence G. Graham and Donald D. Scott, complainants.

This defendant by protestation, not confessing or acknowledging all or any of the matters in the said complainants' bill to be true in such manner and form as the same are therein set forth and alleged, doth demur thereto, and for cause of demurrer showeth that the said complainants have not in and by their said bill made or stated such a case as doth or ought to
33 entitle them to any such relief as is thereby sought and prayed for from and against this defendant. Wherefore this defendant demands the judgment of this honorable court whether he shall be compelled to make any further or other answer to the said bill or any of the matters and things therein contained, and prays to be hence dismissed with his reasonable costs in this behalf sustained.

WM. P. LYNDE,
J. H. VAN DYKE, *Solicitors.*

N. J. EMMONS, *of Counsel.*

DISTRICT OF WISCONSIN, *ss:*

Selah Chamberlain, of the city of Cleveland, in the State of Ohio, being duly sworn, says that he is the defendant named in the foregoing demurrer, and he further says that said demurrer is not interposed for delay.

S. CHAMBERLAIN.

Sworn to before me September 18th, 1863.

JOHN MILLER, *Clerk.*

[Revenue stamp.]

I certify that in my opinion the foregoing demurrer of Selah Chamberlain, defendant, is well founded in point of law.

N. J. EMMONS, *of Counsel.*

And afterwards, to wit, on the 4th day of April, 1864, being the
34 first Monday of said month, came the said complainants by Matt. H. Carpenter, their solicitor, and entered in the Order and Rule Book an order as follows:

LAWRENCE G. GRAHAM AND DONALD D. SCOTT
vs.
THE LA CROSSE AND MILWAUKEE RAILROAD COMPANY and Selah Chamberlain.

On motion of Matt. H. Carpenter, solicitor for complainants, ordered that the demurrer in this cause be, and hereby is, set down for hearing on the third Monday of April, A. D. 1864.

Dated April 4, 1864.

Demurrer sustained and bill dismissed.

And afterwards, to wit, on the tenth day of the said April term, A. D. 1864, to wit, on the 28th day of April, A. D. 1864, came the respective parties by their counsel, and this cause came on to be heard on the demurrer of the defendants to the complainants' bill, and was submitted by counsel without argument; and on consideration thereof it was ordered by the court that said demurrer be, and the same hereby is, sustained; and it is further ordered, adjudged, and decreed by the said court that the said com-
35 plainants' bill of complaint be, and the same is, dismissed at the costs of the complainants. And came the complainants by their counsel and prayed an appeal to the Supreme Court of the United States; whereupon it is ordered by this court that said appeal be allowed upon the said complainants giving bond with sufficient sureties in the penalty of two hundred and fifty dollars to be approved by the court or a judge thereof.

Appeal bond of Graham and Scott.

And afterwards, to wit, on the sixth day of May, A. D. 1864, came the said complainants and filed their bond for appeal with sureties, which was duly approved, as follows:

Bond.

Circuit court of the United States for the 9th circuit and district of Wisconsin, in equity.

LAWRENCE G. GRAHAM AND DONALD D. SCOTT, compl'ts,
vs.
THE LA CROSSE AND MILWAUKEE RAILROAD COMPANY and Selah Chamberlain, defendants.

Know all men by these presents that we, Lawrence G. Graham, as
36 principal, and S. C. Hall, Aug. H. Scoville, and Oreb Montague, of Whitewater, Wis., as sureties, are held and firmly bound unto the La Crosse and Milwaukee Railroad Company and Selah Chamberlain, and to each of them, in the full sum of two hundred and fifty dollars lawful money of the United States, for the payment of which, well and truly to be made, we hereby bind ourselves and our representatives firmly by these presents.

Dated, signed, sealed, and delivered this 30th day of April, A. D. 1864.

Provided, however, these presents are upon the condition following, that is to say: whereas the said Lawrence G. Graham and Donald D. Scott have taken their appeal from an order of the said circuit court in the above-enti-

tled cause, made on the 20th day of April, A. D. 1864, sustaining the demurrer of Selah Chamberlain to the complainants' bill of complaint in the above-entitled cause and dismissing said bill of complaint, now, therefore, the condition of this obligation is such that if the said Lawrence G. Graham and Donald D. Scott shall prosecute their said appeal to effect, and answer all costs if they shall fail to make good their appeal, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

37 LAWRENCE G. GRAHAM. [SEAL.]
S. C. HALL. [SEAL.]
AUG'T H. SCOVILLE. [SEAL.]
O. MONTAGUE. [SEAL.]

DISTRICT OF WISCONSIN,
State of Wisconsin, Walworth County, ss:

S. C. Hall, being first duly sworn, on oath, says that he signed and sealed the foregoing bond; that he is a resident and freeholder in the State of Wisconsin; and that he is worth one thousand dollars over and above all indebtedness and exemptions of property from forced sales on execution.

S. C. HALL.

Subscribed and sworn to before me this 6th day of May, A. D. 1864.

T. D. WEEKS,
[SEAL.] *Notary Public, Wal. Co., Wis.*

[Rev. stamp.]

DISTRICT OF WISCONSIN,
State of Wisconsin, Walworth County, ss:

Aug. H. Scoville, being first duly sworn, on oath, says that he signed and sealed the foregoing bond; that he is a resident of and freeholder in the State of Wisconsin; and that he is worth one thousand dollars over and above all indebtedness and exemptions of property from forced sales on execution.

AUG'T H. SCOVILLE.

Subscribed and sworn to before me this 6th day of May, A. D. 1864.

T. D. WEEKS,
[SEAL.] *Notary Public, Wal. Co., Wis.*

[Rev. stamp.]

38 DISTRICT OF WISCONSIN,
State of Wisconsin, Walworth County, ss:

Oreb Montague, being first duly sworn, on oath, says that he signed and sealed the foregoing bond; that he is a resident of and freeholder in the State of Wisconsin; and that he is worth one thousand dollars over and above all indebtedness and exemption of property from forced sales on execution.

O. MONTAGUE.

Subscribed and sworn to before me this 6th day of May, A. D. 1864.

T. D. WEEKS,
[SEAL.] *Notary Public, Wal. Co., Wis.*

[Rev. stamp.]

I hereby approve this bond and the sureties thereto. Dated May 7th, 1864.

A. G. MILLER, *District Judge.*

Filed 7th May, 1864.

40 UNITED STATES OF AMERICA, *District of Wisconsin, ss:*

I, A. Scott Sloan, clerk of the circuit court of the United States of America for the 9th circuit and district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and that they are true copies of their respective originals now on file and remaining of record in my office; being a complete and perfect exemplification of the record and proceedings in the suit of Charles Howard against the La Crosse and Milwaukee Railroad Company and Selah Chamberlain.

In testimony whereof, I have hereunto set my hand and duly
[SEAL.] affixed the seal of the said court, at the city of Milwaukee, in said district of Wisconsin, this 7th day of May, A. D. 1864, and of the independence of the United States the eighty-eighth.

A. SCOTT SLOAN, *Clerk.*

Fees $13 00.

Filed May 14, 1864.

tled cause, made on the 20th day of April, A. D. 1864, sustaining the demurrer of Selah Chamberlain to the complainants' bill of complaint in the above-entitled cause and dismissing said bill of complaint, now, therefore, the condition of this obligation is such that if the said Lawrence G. Graham and Donald D. Scott shall prosecute their said appeal to effect, and answer all costs if they shall fail to make good their appeal, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

37

LAWRENCE G. GRAHAM. [SEAL.]
S. C. HALL. [SEAL.]
AUG'T H. SCOVILLE. [SEAL.]
O. MONTAGUE. [SEAL.]

DISTRICT OF WISCONSIN,
State of Wisconsin, Walworth County, ss:

S. C. Hall, being first duly sworn, on oath, says that he signed and sealed the foregoing bond; that he is a resident and freeholder in the State of Wisconsin; and that he is worth one thousand dollars over and above all indebtedness and exemptions of property from forced sales on execution.

S. C. HALL.

Subscribed and sworn to before me this 6th day of May, A. D. 1864.

[SEAL.]

T. D. WEEKS,
Notary Public, Wal. Co., Wis.

[Rev. stamp.]

DISTRICT OF WISCONSIN,
State of Wisconsin, Walworth County, ss:

Aug. H. Scoville, being first duly sworn, on oath, says that he signed and sealed the foregoing bond; that he is a resident of and freeholder in the State of Wisconsin; and that he is worth one thousand dollars over and above all indebtedness and exemptions of property from forced sales on execution.

AUG'T H. SCOVILLE.

Subscribed and sworn to before me this 6th day of May, A. D. 1864.

[SEAL.]

T. D. WEEKS,
Notary Public, Wal. Co., Wis.

[Rev. stamp.]

38 DISTRICT OF WISCONSIN,
State of Wisconsin, Walworth County, ss:

Oreb Montague, being first duly sworn, on oath, says that he signed and sealed the foregoing bond; that he is a resident of and freeholder in the State of Wisconsin; and that he is worth one thousand dollars over and above all indebtedness and exemption of property from forced sales on execution.

O. MONTAGUE.

Subscribed and sworn to before me this 6th day of May, A. D. 1864.

[SEAL.]

T. D. WEEKS,
Notary Public, Wal. Co., Wis.

[Rev. stamp.]

I hereby approve this bond and the sureties threto. Dated May 7th, 1864.

A. G. MILLER, *District Judge.*

Filed 7th May, 1864.

40 UNITED STATES OF AMERICA, *District of Wisconsin, ss:*

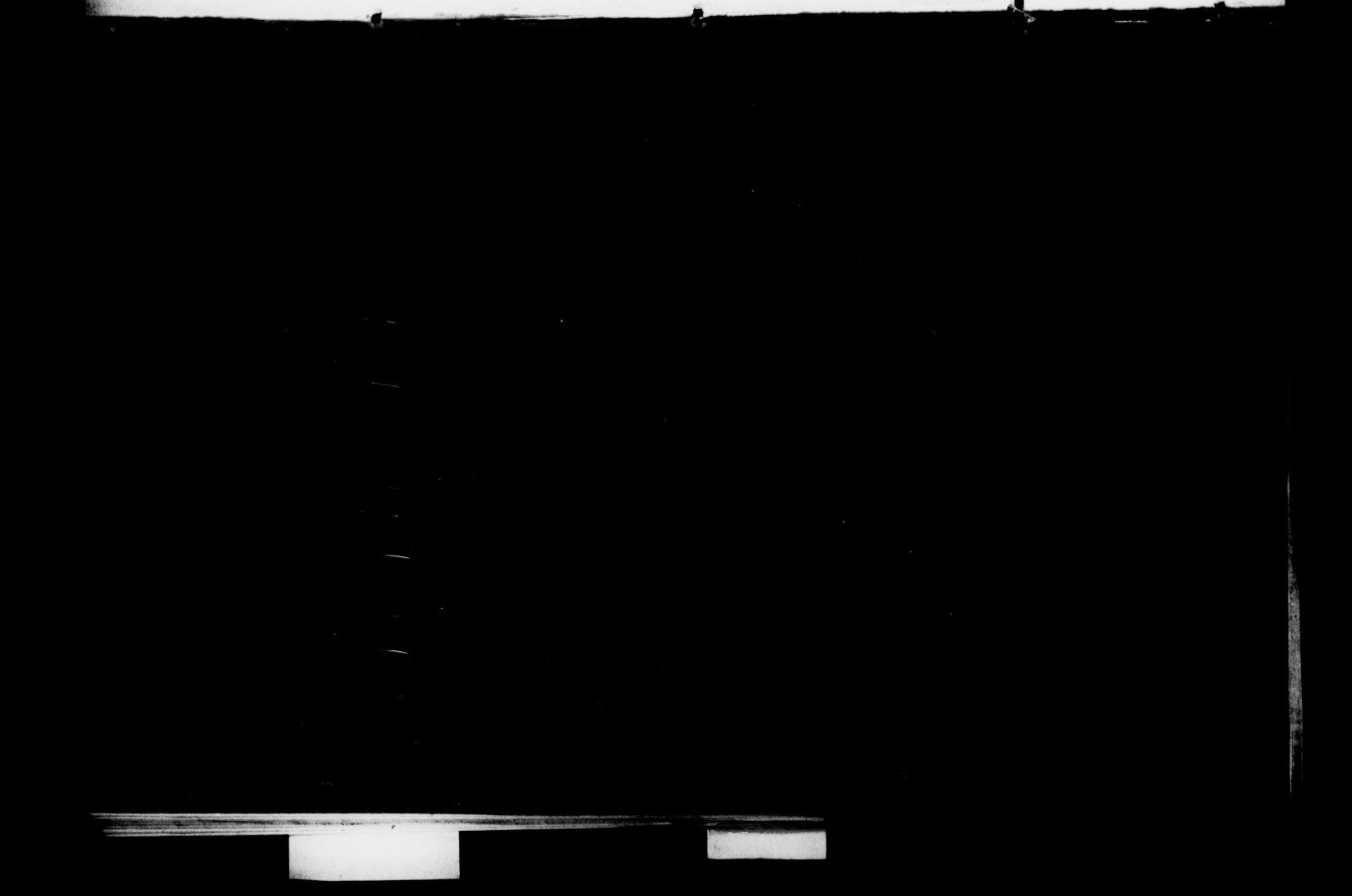
I, A. Scott Sloan, clerk of the circuit court of the United States of America for the 9th circuit and district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and that they are true copies of their respective originals now on file and remaining of record in my office; being a complete and perfect exemplification of the record and proceedings in the suit of Charles Howard against the La Crosse and Milwaukee Railroad Company and Selah Chamberlain.

In testimony whereof, I have hereunto set my hand and duly
[SEAL.] affixed the seal of the said court, at the city of Milwaukee, in said district of Wisconsin, this 7th day of May, A. D. 1864, and of the independence of the United States the eighty-eighth.

A. SCOTT SLOAN, *Clerk.*

Fees $13 00.

Filed May 14, 1864.



Supreme Court of the United States.

No. 150, December Term, 1865.

LAWRENCE G. GRAHAM AND DONALD D. SCOTT,

Complainants and Appellants,

vs.

THE LA CROSSE AND MILWAUKEE RAILROAD COMPANY AND SELAH CHAMBERLAIN.

BRIEF FOR APPELLANT.

MATT. H. CARPENTER,

Counsel.

Starr & Son, Law Printers, Milwaukee.

Supreme Court of the United States.

No. 150, DECEMBER TERM 1865.

LAWRENCE G. GRAHAM AND DONALD D. SCOTT,

Appellants,

vs.

THE LA CROSSE & MILWAUKEE RAILROAD COMPANY and SELAH CHAMBERLAIN.

This was a creditors bill filed by Graham & Scott, judgment creditors of the Railroad Company, the bill was demurred to, the demurrer sustained and the complainants appeal.

The averments of the bill, confessed by the demurrer, are in substance:

That Graham and Scott, being creditors of the Railroad Company from December 1, 1857, recovered judgment against the Company in the District Court of the United States for the District of Wisconsin, on the 11th day of January, 1860, for $44,413.18, with the usual

allegations of a creditor's bill in regard to the issuance and return of the execution, the amount due, &c.

That the Railroad Company on the 26th day of September, 1857, was greatly embarrassed, and in failing circumstances; and that attachment suits had been and were being commenced against the Company; that the Company was unable to pay its debts and prosecute the completion of its road; "and that the Company then and there design- "ing and intending to hinder, delay and defraud its creditors, and to "hold its creditors at defiance, and apply its revenue and means to the "completion of its road, did pretend to make, and in form did, make, "execute and deliver to said Selah Chamberlain a pretended deed or "lease," copy of which is attached as an exhibit—Record, p. 2, and R. p. 7. The bill avers that the Company had no legal power to make the lease, and it was for that reason null and void.

That afterwards, on the 2d day of October, 1857, the Company and Chamberlain, "fearing and being advised by counsel of the said "Chamberlain that there was some doubt whether the said fraudulent "purposes, designs and intentions of the said Company, and the said "Chamberlain could be accomplished under and by said deed or lease," &c., the said Company and said Chamberlain "did on that day "further combine and confederate together to hinder, delay and "defraud the creditors of the said Company," &c., "and did then "and there agree that said Company should, and said Company then "and there did, confess and suffer a judgment against it and in favor of "said Chamberlain in the District Court of the United States for the "District of Wisconsin, without service of process or suit brought "for" $629,089.72; and "that said Company, when it confessed and "suffered said judgment to pass as aforesaid, was not indebted to the "said Chamberlain in any considerable amount," and "that said "indebtedness was less than $50,000;" that said Company never received any consideration for said judgment, except said indebtedness; "and that said judgment was only confessed by said Company in "pursuance of said unlawful combination and confederacy between "said Company and said Chamberlain, and for the purpose of "bolstering up said fraudulent deed or lease, and for the purpose and "with the intent and design on the part of said Company, and its

"board of directors, and the said Chamberlain to thereby hinder, "delay and defraud the creditors of said Company," &c.

That said lease, apart from the design with which it was executed, did in fact, in its practical operations hinder and delay creditors unreasonably; and created and continued trusts in favor of said company to an unlimited amount; and enabled the company to prosecute its business, and apply the earnings of its road to its completion in defiance of creditors

That Chamberlain immediately after the execution of said lease entered into possession under it.

That on the 3d day of October 1857, one Newcomb Cleaveland obtained a judgment in said District Court, against said company for over one hundred thousand dollars, issued execution thereon, and levied on the railroad and property covered by the lease to Chamberlain. That afterwards said Cleveland exhibited his bill of complaint against said Company and said Chamberlain, copy of which is attached, (Record p. 11,) and shows (Record p. 14,) that the Cleveland bill sought to set aside the Chamberlain lease and judgment, upon two grounds: (1) that the lease was executed without authority by the company and was therefore *ultra vires* and void; (2) that it was given to defraud creditors, and was therefore void; and that the judgment was equally void. R. p. 15, 16.

That upon this Cleveland bill, a final hearing was had on the merits and the Court rendered a decree, copy of which is set forth (Record p. 10,) and shows that the decree did not merely declare the lease and judgment void as to creditors; did not postpone the lease and judgment as to creditors, leaving them in full force *inter partes*; but that the Court absolutely annulled the lease and vacated the judgment *inter partes*, and as to all the world; so that Chamberlain can no longer claim any right under either lease or judgment even as against the Company, and he was expressly perpetually enjoined from from so doing.

That notwithstanding said perpetual injunction, the said Chamberlain continued in possession until after December 1st, 1859, and that after the said Cleveland decree, he received as nett earnings:

March, 1859,	$1,561
April,	576
May,	14,025
June,	18,175
July,	662
August,	19,305
September,	66,264
October,	71,980
	$192,548

"All of said sums being nett earnings, and moneys accruing from "the rents, tolls and income of said Railroad Company, and which "said Chamberlain received without shadow of right, and without any "claim thereto; and all of which money the said Chamberlain holds "in trust for the said Railroad Company, or its creditors," &c.

And that Chamberlain pretends that the Company is indebted to him; but that the fact is that he is largely indebted to the Company over and above the money mentioned, recovered by him after the Cleveland decree.

The bill shows Chamberlain in possession of a large sum of money derived from the operation of the Company's railroad and property, which is applicable to the complainant's judgment, unless Chamberlain is entitled to retain the same under the lease or judgment given and confessed by the Company.

We impeach this lease and judgment upon the following grounds:

(1) Both are by the demurrer admitted to have been given and confessed, with the intent thereby to hinder, delay and defraud the creditors of the Company;

(2) The lease was given without authority of law, and is *ultra vires*;

(3) The lease is void on its face, apart from the intention with which it was given, in that it does in fact and by its own terms, hinder and delay creditors, and reserve to the Company the benefit of its property in defiance of its creditors;

(4) That both lease and judgment are absolutely annulled and vacated *inter parties*, by the Cleveland decree.

I shall consider these points in the inverse order in which they are above stated.

I

The Cleveland decree was not one merely postponing the lease and judgment of Chamberlain as to other creditors; it absolutely annulled the lease and vacated the judgment. The language of the decree is as follows:

"It is ordered, adjudged and decreed by the Court that the article of "agreement" [the lease] "be and hereby is vacated, annulled and made "void, so that the same shall not hereafter be of any force or effect "whatever."

"And that the said Chamberlain be and hereby is perpetually enjoined "and restrained from using, managing running, controlling, or meddling "with said railroad, or the rolling stock, personal property, or any of its "appurtenances or franchises, or anything connected therewith, under "or by virtue of said article of agreement.

"And it is further ordered, adjudged and decreed by the Court, that "the judgment of the said Selah Chamberlain against the La Crosse & "Milwaukee Railroad Company, entered in this Court" * * "and all "executions and proceedings thereon be, and hereby are, vacated, an-"nulled, made void, set aside, so that the same shall have no further "effect whatever." See the Cleveland decree, record 10.

It is impossible to prove an axiom; impossible to argue either for or against plain, unambiguous language. No illustration can make this decree plainer, no human language could make it more specific, complete or absolute. When a lease is absolutely "vacated, anulled and made void, so that the same shall not hereafter *be of any force or effect whatever:*" and the lessee is "*perpetually* enjoined and restrained" from claiming or doing anything under or by virtue of the lease; can anything more be done to complete its destruction? When a judgment is absolutely "vacated, annulled, made void, set aside, so that the same shall have have *no further effect* WHATEVER," can it possibly be claimed that the judgment is perfectly good as between the parties to it, and remains a lien upon the debtor's property against all the world, except one, Cleveland? If this lease and judgment have any existence after

the sweeping decree above quoted, then it is certain that it is not in the power of any Court to destroy either of them. What human language could make one, if this is not an absolute decree?

The Court in the Cleveland suit undoubtedly had the power to postpone the Chamberlain lease and judgment to other creditors, leaving it in full force as between Chamberlain and the Company. *But this it did not do.* Mr. Webster once triumphantly defied his opponent to reason the *seal from a bond*, yet it would seem that such a task were quite as easy as to establish that a judgment which has been vacated is still a judgment; that a judgment which has been "vacated, set aside, made void, so that the same shall have *no further effect whatever*," is after all, a *pretty good judgment*, and PERFECTLY CONCLUSIVE against all the world, except Newcomb Cleveland. By nothing short of the utmost violence upon language can this decree be read otherwise than as it is written, a clear, complete, abso'ute annihilation of both lease and judgment to all intents and purposes, and as to all persons and parties.

WHAT WERE THE RESPECTIVE RIGHTS *of Chamberlain and the Company, as to the operation and management of this railroad after the Cleveland decree?*

Here was a vast public enterprise, a railroad, with franchises and appurtuant property worth millions of dollars, which must be thereafter operated by some one, or the franchises which become forfeited to the State by *non user*.

But three parties were before the Court.

(1) Cleveland a judgment creditor,

(2) the Railroad Company.

(3) Selah Chamberlain.

It is certain Chamberlain could not thereafter manage the road "under his lease for he was "*perpetually* enjoined and restrained "from using, managing, running, controlling or meddling with said "railroad, or the rolling stock, personal property, or any of its ap-"purtenances or franchises, or anything connected therewith, under or "by virtue of said" lease.

The decree did not authorize Cleveland to operate the road, or in any way interfere with it, by appointing a Receiver or otherwise.

Who was to operate it? Manifestly the Railroad Company and

no one else. Suppose that the day after this decree, the Company had entered into possession and commenced running trains, as it had done before the lease to Chamberlain. Could Chamberlain, whose lease was absolutely vacated, and who was perpetually enjoined from meddling with the road or its franchises or rolling stock in any manner, and from pretending to set up any right under his lease, have prevented the Company's doing so? Certainly not. Could Cleveland have prevented it? Certainly not, for the decree gave him no right to operate or control the operation of the road. The Company was originally charged with this duty, which it had sought by the lease to delegate to Chamberlain; but when the lease was swept away and Chamberlain *perpetually* enjoined from operating the road, did not the right and duty of the Company under its charter at once revive, even conceding the lease to have suspended it? The *restraining* clause in the decree is conclusive of the intention of the Court, and gives character to the decree *as an absolute adjudication between Chamberlain and the Company.* He was enjoined from managing or interfering with the road, not as against Cleveland, nor until the tolls of the road should satisfy Cleveland's judgment, but perpetually, *forever.* And no party or person was appointed to this duty.

In the very nature of things, the Company must resume control of the road, after Chamberlain was enjoined from so doing. This must have been the intention of the Court, or the Court must be deemed to have intended that this great public enterprise should be abandoned, its franchises become forfeited, and creditors and everybody else connected with it, be ruined outright. It is absurd to say that this decree did not change the relations of Chamberlain and the Company, *inter se*, as to this great property. It bound Chamberlain hand and foot, not for a time, nor for a purpose, but *absolutely, perpetually, forever.* The decree manifestly proceeded upon the first ground taken in the bill, that the lease was an unauthorized act of the Company *ultra vires*, void as between the parties, and as between the parties and the public; and so the decree extirpated the lease, "wrung its neck," and trampled it under foot. It was no longer to be any protection to Chamberlain in his usurpation of great corporate franchises; no longer to protect the Company in its evasion of its duty to operate this road itself. And the moment the decree was enrolled, it became the right and the duty of the Company to resume its abdicated

franchises, and exercise them for the public benefit, according to its charter obligations to the State, and neither Chamberlain, nor any one else, could interfere.

IT IS THE SPECIAL BOAST of a court of equity, that it does complete justice, and not by halves; that its decrees not only settle rights as between plaintiff and defendants, but as between the defendants themselves. The reason given for making all persons interested in the subject matter, parties defendant, is that the Court may by one decree accomplish what would otherwise require many suits, and may at once adjust the rights of all parties interested. This, its decrees would not do, if they were not as binding among defendants in subsequent litigation between themselves, as between the plaintiff and the defendants. The cases fully establish this quality of decrees in equity.

Story Eq. Pl. sec. 72, 73.
Farquarson vs. Seaton, 5, Russ. 45.
S. C. 5, Eng. Ch. 46.

Farquarson v. Seaton, 5 *Russ.* 45, is a strong authority to show that this decree would be conclusive in any subsequent litigation upon the subject between Chamberlain and the Company.

The counsel opposed cite a class of cases where it has been held that in cases where deeds, judgments, &c., have been postponed as to creditors, and left in full force *inter se se*, that no creditor not a party to the first suit can avail himself of the former decision, because he would not have been bound by it, if the decision had been the other way, and estoppels must be mutual. *I fully concede this to be the law, but that is not this case.* Here the lease was not merely declared fraudulent as to creditors; it was absolutely annulled, so that it should *thereafter be of no force or effect whatever.* The judgment was not postponed as to other creditors; it was *vacated.*

2. Starting from the absolute character of this decree, we come to the question, whether it can be used in evidence by any person against Chamberlain to prove that he is not a lien creditor of the La Crosse Company. On such an issue being made up between us and Chamberlain, he produces his lease and the record of his judgment. We are no party to either lease or judgment. Yet no one doubts that both are competent evidence as against us.

Why is it that the record of the judgment at law, in the suit between Chamberlain and the La Crosse Company, is evidence of his being a

lien creditor of that Company, in a suit against us, who were not parties to that judgment? It is because a judgment is "the only proper evidence of itself, and is conclusive evidence of the fact of the rendition of the judgment, *and of all the legal consequences resulting from that fact*, whoever may be the parties to the suit in which it is offered."

1 Green'l Ev., sec. 538.

On the question in this suit, between us and Chamberlain, whether or not he is a creditor of the La Crosse Company, the judgment record, in a suit between Chamberlain and the Company is proper, and the only proper evidence, even as against us, who were not parties to that suit. So when we are called upon to prove the issue on our part, prove that he is not a lien creditor of that Company, we produce the record of another suit, to which both he and that Company were parties, and in which suit, this very judgment was set aside, vacated, annulled, so that it should thereafter have no effect whatever. Suppose, after the rendition of the judgment at law in favor of Chamberlain against the Company, the Company had prosecuted a writ of error to the Supreme Court of the United States; and upon that writ, the Supreme Court had reversed, vacated, and set aside the judgment. Could not any person, against whom Chamberlain afterwards produced the record in the Court below as evidence of his being a lien creditor of the Company, have replied the record of the cause in the Supreme Court on the writ of error, *in which the same judgment had been vacated?* Such record of the Supreme Court would be evidence in favor of any person in the world, because that record would be evidence of itself, and conclusive evidence of the fact of the rendition of the judgment (in that Court reversing and vacating the judgment in the Court below), *and of all the legal consequences resulting from that fact*, without regard to who were parties in the suit in which it was offered.

1 Green'l Ev., sec. 538.

It is presumed every one would agree, that in such a case, between Chamberlain and third persons, the judgment of reversal on the writ of error, would be a conclusive answer to the record of the judgment itself; and yet it is confidently submitted, that no distinction can be shown between the record on such writ of error, and the record of any other cause to which both parties to the judgment were parties, over which the

franchises, and exercise them for the public benefit, according to its charter obligations to the State, and neither Chamberlain, nor any one else, could interfere.

IT IS THE SPECIAL BOAST of a court of equity, that it does complete justice, and not by halves; that its decrees not only settle rights as between plaintiff and defendants, but as between the defendants themselves. The reason given for making all persons interested in the subject matter, parties defendant, is that the Court may by one decree accomplish what would otherwise require many suits, and may at once adjust the rights of all parties interested. This, its decrees would not do, if they were not as binding among defendants in subsequent litigation between themselves, as between the plaintiff and the defendants. The cases fully establish this quality of decrees in equity.

Story Eq. Pl. sec. 72, 73.
Farquarson vs. Seaton, 5, Russ. 45.
S. C. 5, Eng. Ch. 46.

Farquarson v. Seaton, 5 *Russ.* 45, is a strong authority to show that this decree would be conclusive in any subsequent litigation upon the subject between Chamberlain and the Company.

The counsel opposed cite a class of cases where it has been held that in cases where deeds, judgments, &c., have been postponed as to creditors, and left in full force *inter se se*, that no creditor not a party to the first suit can avail himself of the former decision, because he would not have been bound by it, if the decision had been the other way, and estoppels must be mutual. *I fully concede this to be the law, but that is not this case.* Here the lease was not merely declared fraudulent as to creditors; it was absolutely annulled, so that it should *thereafter be of no force or effect whatever.* The judgment was not postponed as to other creditors; it was *vacated.*

2. Starting from the absolute character of this decree, we come to the question, whether it can be used in evidence by any person against Chamberlain to prove that he is not a lien creditor of the La Crosse Company. On such an issue being made up between us and Chamberlain, he produces his lease and the record of his judgment. We are no party to either lease or judgment. Yet no one doubts that both are competent evidence as against us.

Why is it that the record of the judgment at law, in the suit between Chamberlain and the La Crosse Company, is evidence of his being a

lien creditor of that Company, in a suit against us, who were not parties to that judgment? It is because a judgment is "the only proper evidence of itself, and is conclusive evidence of the fact of the rendition of the judgment, *and of all the legal consequences resulting from that fact*, whoever may be the parties to the suit in which it is offered."

1 Green'l Ev., sec. 538.

On the question in this suit, between us and Chamberlain, whether or not he is a creditor of the La Crosse Company, the judgment record, in a suit between Chamberlain and the Company is proper, and the only proper evidence, even as against us, who were not parties to that suit. So when we are called upon to prove the issue on our part, prove that he is not a lien creditor of that Company, we produce the record of another suit, to which both he and that Company were parties, and in which suit, this very judgment was set aside, vacated, annulled, so that it should thereafter have no effect whatever. Suppose, after the rendition of the judgment at law in favor of Chamberlain against the Company, the Company had prosecuted a writ of error to the Supreme Court of the United States; and upon that writ, the Supreme Court had reversed, vacated, and set aside the judgment. Could not any person, against whom Chamberlain afterwards produced the record in the Court below as evidence of his being a lien creditor of the Company, have replied the record of the cause in the Supreme Court on the writ of error, *in which the same judgment had been vacated?* Such record of the Supreme Court would be evidence in favor of any person in the world, because that record would be evidence of itself, and conclusive evidence of the fact of the rendition of the judgment (in that Court reversing and vacating the judgment in the Court below), *and of all the legal consequences resulting from that fact*, without regard to who were parties in the suit in which it was offered.

1 Green'l Ev., sec. 538.

It is presumed every one would agree, that in such a case, between Chamberlain and third persons, the judgment of reversal on the writ of error, would be a conclusive answer to the record of the judgment itself; and yet it is confidently submitted, that no distinction can be shown between the record on such writ of error, and the record of any other cause to which both parties to the judgment were parties, over which the

Court had jurisdiction, and in which, acting within its admitted jurisdiction, the Court had rendered the same judgment, viz.: reversed, annulled, vacated and set aside, his judgment against the Company. If we cannot avail ourselves of this decree vacating his judgment, *because we were not parties to that cause*, we could not avail ourselves of the judgment of the Supreme Court on writ of error, in the case supposed, *for the same reason.*

2. We are under no obligation here to show that the Cleveland decree was properly, that is correctly, rendered. It remains in full force, and when it is offered in evidence, it cannot be attacked collaterally for even manifest palpable error. Voorhies vs. Bank of U. S., 10 Pet .449
Huff vs. Hutchinson, 14 How. 588.

There is no question as to the Courts having had *jurisdiction* to render that decree. *And it is only upon the ground of jurisdiction* that any judgment *can be assailed collaterally.* We might safely concede that this Cleveland decree was erroneous; either because not sustained by the evidence, or as going beyond the prayer of the bill; so that the Supreme Court would have reversed it on appeal. This Chamberlain attempted; and having no hope of success when opposed, be bought up and controlled both sides of the cause for the purpose of making success in the Supreme Court certain; but this "*innocent stratagem*" was detected, and his appeal was dismissed *as a fraud upon the Court.*
Cleveland vs. Chamberlain 1, Black. 419.

But it is by no means conceded that that decree was erronous or could have been reversed on appeal. I have no idea that it could have been, if properly presented to the court by counsel opposed to Chamberlain. That must also have been the opinion of Chamberlain himself when he resorted to the fraudulent scheme of reversing it, by managing both sides of the appeal. The Cleveland bill rested upon two grounds: (1) that the lease was *ultra vires* and therefore void as between the parties to it, and (2) that it was given with the intent in fact, to defraud creditors. Upon the first ground, which we shall show hereafter was well taken, the lease was properly vacated *inter se se.* At all events, upon a cross bill filed by the Company, such decree would have been proper. And that the full decree was rendered without cross bill, even if conceded to be erroneous, does not render the decree void.
Gould vs. Stanton 16, Conn. 12, 20.

II.

But passing the effect of the Cleveland decree, if the validity of the lease and judgment are now to be considered as open questions, both must be declared null and void, for reasons which are still to be given.

FIRST.—There was when this lease was executed no law of Wisconsin authorizing a corporation to lease its road and franchises, and for want of such authority the lease is void.

Beman vs. Rufford, 6 E. L. & Eq. Rep. 110.
Winch vs. Birkenhead, &c., 13 E. L. & Eq. Rep. 516.
The Great Nor. vs. The East Ang., &c., 41 Eng. Ch. Rep. 306.
S. C., 7 Hare Rep. 306.
The New York & M., &c., vs. Winans, 17 How. 30.
Johnson v. S. & B. R'y Co., 3 De Gex M. & G. 914.
London, &c., R'y Co., vs L. & S.W. R'y Co., 4 De Gex & J. 362.

So strictly is this doctrine held that an incorporated company cannot form a partnership by which others are to be admitted to a joint control or participation in the profits of its undertaking.

Sharon Canal Co. vs. Fulton Bank, 7 Wend. 412.
S. & B. R'y Co. vs. London, &c., 4 De Gex M & G. 115.

The attempt to draw a distinction between the right of the company to lease its franchise to exist, which it is conceded cannot be done, and its right to transfer its franchise to operate the road, which it is claimed can be done, is borrowed from a remark of Curtis, J., in

Hall vs. Sullivan R. R., cited, Redfield Railways, p. 578.

But that case did not so decide; and the case

Peter vs. Kendall, 6 B. & Cres., 703,

cited by Judge Curtis to sustain this distinction, *did not involve this point*. In that case Peter had leased a ferry to Brown, but afterwards Brown had surrendered to Peter, and become his servant. It was objected that the action should have been in the name of Brown, the lessee, but the Court held that he, having surrendered, and become the tenant of Peter, the action was well brought; and the Court were not called upon to decide, nor did they, upon the validity of the lease to Brown. But Judge Curtis said in this opinion, that if compelled to decide the question, he should follow *Pierce vs. Emery*, 32 *N. H.*, 484 where it was held *that without legislative license, no transfer of the*

right to operate the road could be made. It is impossible for a corporation to make a contract or conveyance by which it puts it out of its power to perform its duties to the public.

Clark vs. Washington, 12 Wheat., 40.
The N. Y. &c. vs. Winans, 17 How. 30.

As to the duty of the courts to confine corporations to such powers as are expressly granted them, and not by implication enlarge those powers in favor of monoplies and against the public; see

C. J. Taney, Warren Bridge case, 11 Pet. 544.
Perine vs. Ches. & Del. C. Co., 9 How., 183.

2. To avoid this objection, it is claimed that this instrument is not a lease, as it purports to be, but is in legal effect a mortgage, and that by its charter and the laws of the State, the Company had authority to make a mortgage. To this it may be said (1) that the authority to make a mortgage could only be exercised according to the manifest intention of the Legislature, by giving a mortgage in the usual form to be foreclosed on default by the Company. If the mortgage is so given *as to perform the office of a lease*, and give possession before condition broken, and for an indefinite term, then it is as illegal a lease proper would be. What cannot be done directly, the law does not permit to be done indirectly.

This lease, whether *called* a *lease* or a mortgage, is obnoxious to all the objections taken in the cases above cited. It was a surrender and assignment of the rights and franchises which were delegated by the Legislature to the corporation, and might continue indefinitely, without any default on the Company's part. The policy of the State as to railroads when this lease was executed was perfectly clear. They might be mortgaged, but upon such mortgage after default there must be foreclosure by *public sale*. By R. S. 1849, in force when this lease was given, it was provided as to all mortgages, that in all cases for the foreclosure of mortgage the Court, if the money was not brought into Court, should make decree for the sale of the premises, either in parcels, or entire in certain cases. Chap. 84, Sec. 88, 90. The proceeding of strict foreclosure was thereby in effect abolished. A mortgage on a railroad must therefore be followed by a public sale, at which all the citizens could compete by bids for the property; and the Company could not, even by giving mortgage, secure the succession to the mortgagee. But this lease, or *this mortgage*, if that word is preferred, completely defeated this policy of the law. This railroad might remain a thousand years in the posses-

sion of Chamberlain and his heirs without any default on the company's part, and without any opportunity given to the public to purchase the road and franchises. No matter what called, this instrument performed the office of an indefinite lease of the road; and for that reason was *ultra vires* and void. It was an act beyond the power of the company to perform, and therefore void *ab initio* BETWEEN THE PARTIES TO IT. The company could at any time have set aside, or disregarded it; and Chamberlain would have been without remedy.

See cases cited above from English Chancery reports.
Angel & Ames, Corp., Sec. 111, 256, 258, 273, 391, 392, 393.
Bank of Augusta vs. Earle, 13 Pet., 587.
People vs. Utica Ins. Co., 15 J., 387.
Bank U. S. vs. Danbridge, 12 Wheat., 68.
Dartmouth College vs. Woodward, 4 Wheat., 368.
Madison, &c., vs Watertown Plank Road, &c., 7 Wis., 59.

This instrument is not a mortgage, or at least is not such a mortgage, nor given for such a purpose, nor in such form as contemplated by the Legislature. Chapter 78, Private Laws 1856, authorized the Company to make and issue its bonds to be secured by a mortgage; but required the company by resolution to prescribe "*the sum or sums* for which "each of such bonds shall be issued, *the time or times*, and *place or* "*places*, when and where the principal and interest of the same shall "be payable; the person or persons, trustee or corporations to which "they shall be payable, and whether payable to order, or to bearer, or "how otherwise negotiable; the rate of interest which such bonds shall "bear, and the manner and form in which they and the interest coupons "annexed to them shall be executed. And to secure the payment of "any or all of said bonds, the La Crosse and Milwaukee Railroad "Company are hereby authorized and empowered in its corporate "capacity to make, execute and deliver a mortgage or deed of trust "upon the whole, or any part of its railroad, constructed or authorized "to be constructed, or of any or all of their estate, real, personal or "mixed, in possession or expectancy; and the said company is also "hereby authorized and empowered, in and by such mortgage, or deed "of trust, to confer upon the trustee or mortgagee, full and ample "powers, to enter in and upon, and to take possession of, have, use "and employ, or to sell and dispose of the whole, or any part of said

"railroad or estate, together with the functions appertaining to said "railroad, and all corporate and other franchises, rights and privileges "of the said La Crosse and Milwaukee Railroad Company."

This is believed to be the first act, authorizing the company to mortgage its franchises. And it is manifest what kind of a mortgage was contemplated by this act, viz: a mortgage to secure a fixed sum, payable at a fixed time. Such a mortgage the company was empowered to make. But this lease has no resemblance to it; it is not for a fixed, or certain sum; it is not payable at any particular time or place. It was putting the company, the stockholders and the public into Chamberlain's power completely. No one could know, without a litigation, the extent of his claim, or the amount to be paid for redemption. It was a complete departure from the policy of the law *and* A LEASE, not a mortgage, of the property and franchises of the company. The language of the instrument is conclusive; it is not a *grant* of the fee upon condition, but is expressed as follows: the company "hereby *sells and conveys* to the said "'Chamberlain' all its personal property" &c., and the company "hereby "LEASES and LETS to the said 'Chamberlain' from and after the thirtieth "day of September, in the year 1857, *for an indefinite term of time*, to "be determined in the manner hereinafter specified, its entire railroad," &c. Counsel opposed have claimed this lease to be a *Welsh Mortgage*, which it resembles about as much as it does a *Welsh Rabbit*. A Welsh Mortgage, was a conveyance of the fee, upon the understanding that the rents and profits were to be received instead of the interest, until the mortgager should pay the whole principal sum; this instrument is not a conveyance of the fee, but a *lease* for a *term*; and the rents and profits are to be applied to four different subjects, before any application could be made by Chamberlain to his own claims, and then that application was to be made not to pay the interest on a certain and indefinite sum of principal, but to the payment of what was due or to become due Chamberlain from the company.

THIS INSTRUMENT IS A LEASE, and not a mortgage, and was executed without any authority from the Legislature; and was therefore *ultra vires* and void, even between the company and Chamberlain; and upon this ground alone, the absolute decree in the Cleveland suit, was correct; and could not have been reversed on appeal. This is one of the grounds, as we have before shown, taken in the Cleveland bill; and must be presumed from the record of that cause, to have been the ground upon which

the decree rested. The Legislature never intended to authorize an instrument like this lease to be followed by immediate possession. Judge Ruffin, in Pointdexter v. McCannon, 1 Bad. & Dev. N. C. Eq. says: "No mortgagee or mortgagor ever yet made a contract, upon which the "possession was to change immediately, unless it was the veriest grinding bargain that could be driven with a distressed man, who had no "way to turn."

Second.—This instrument, whether lease or mortgage, was and is void as to all existing or subsequent creditors, in that by its very terms it hindered, delayed and defrauded creditors, by cloaking the property of the company and applying the rents and profits to the exclusive benefit of the company, making no provision for creditors.

This is precisely the case, which the statutes against fraudulent conveyances were intended to reach.

Chap. 6, 50 Ed., 3 passed in 1376, (2 Eng. St. at large, p. 202,) the first statute upon this subject, has a preamble reciting the evil to be remedied as follows:

"Item, because that divers people inherit of divers tenements, borrowing divers goods, in money or in merchandize, of divers people of "this realm *do give their tenements and chattels to their friends*, by "collusion thereof, *to have the profits at their will*, and afterwards do "flee to the franchise of Westminster of St. Martin le Grand, of London, or other such privileged places, *and there do live a great time "with an high countenance of another man's goods and profits of the "said tenements and chattels*, till the said creditors shall be bound to "take a small parcel of their debt, and release the remnant."

"It is ordained and assented, that if it be found that such gifts be "so made by collusion that the said creditors shall have execution of "the said tenements and chattels as if no such gift had been made.

The 13 Eliz., chap. 4, (6 Eng. St. at large 356,) recites: "For as "much as not only the Queen's most excellent Majesty, but also divers "of her Highness' good and loving subjects, * * may have "incur and receive great loss and prejudice by reason of fraudulent "and covinous conveyances * * heretofore made or hereafter "to be made, &c., * * "which were or hereafter shall be meant by "the parties making the same to be fraudulent," &c., * * * "*or else by the secret intent of the parties, the same to be their own*

"*proper use*, and at their free disposition, colored nevertheless with "feigned countenance, and show of words and sentences, as though "the same were made *bona fide* for good causes and upon just and "lawful considerations; for remedy of which inconveniences, &c., be "it ordained," &c., &c.

The attempt of fraudulent debtors from the earliest time to the execution of this lease has been to save their property from their creditors, and apply it, or the rents of it, more or less directly to their own benefit. A debtor in a flourishing business, with property ample to pay his debts, falls into sudden, and he hopes, temporary embarrassment, and is unable to meet his pressing debts. He flatters himself, that another year it will be better with him, or times will be easier, and money more plenty; and if he can save his property till then, he can pay all, and save something for himself and family. All this is very well, if the creditor will consent, but the debtor has no right to demand it. He may appeal to the creditor's mercy, but cannot demand delay as a matter of *right*.

The law and morality of this subject are all summed up, by the great Teacher, in Matthew XVIII, v. 24—27.

"And when he had begun to reckon, one was brought unto him which "owed him ten thousand talents. But for as much as he had not to "pay, his lord commanded him to be sold, and his wife and his "children, and all that he had, and payment to be made. The servant "therefore fell down and worshipped him, saying, lord *have patience* "*with me*, and I will pay thee all. Then the lord of that servant *was* "*moved with compassion, and loosed him and forgave him the debt.*"

In this matter Chamberlain and the company are *in like cerdem ratione*. All men must be deemed to have intended the consequences of their conduct. Here the thing done was a fraud upon creditors. As both Chamberlain and the company intended to do what was done; they must both be deemed to have intended thereby to defraud creditors. By the contract Chamberlain agreed to complete the road for the company; by the lease the company agreed that the rents and profits, toll and income of its railroad and franchises (all the property it had) should, after paying interest on the mortgages, be applied to what was then due Chamberlain, *and what should thereafter accrue to him under his contract of that date for the completion of the road*. This was

intended by both parties; this was agreed upon; *this was a fraud upon creditors:* Chamberlain had a perfect right at that time, if the company was then indebted to him, and unable longer to continue the construction of the road, to take any proper steps to secure his then existing indebtedness; but he had no right to couple the security of his debt with a contract to aid the company, to cloak its property and apply its earnings to the completion of the road; and his attempt to do so marks the whole transaction as a fraud upon creditors, and therefore he cannot, as against creditors, insist upon his lease and judgment even to secure his then existing indebtedness.

Though a purchaser may pay full value for property, yet if he knows it is sold to defraud creditors, the sale is void.

Gardner vs. Otis, 13 Wis., 460.
Beales vs. Guernsey, 8 J., 446.

A sale on execution, issued on a valid, unpaid judgment, if intended to defraud creditors is void. *Crayre vs. Sprague*, 12 *Wend.*, 41. A debtor at the point of death makes conveyance, to be applied *part to the payment of bona fide debts*, part for the benefit of wife and children; *the sale is void altogether.* Welcome vs. Batchelor, 10 Shep., 85.

A conveyance which creates a trust, whether secret or avowed, in favor of the grantor, renders the transaction void, even though there may be mingled with it provisions in favor of *bona fide* creditors.

Shaffer vs. Watkins, 7 Watts and Serg., 219.

"Twyne's case, 2 Resolution. "Secondly it was resolved, that "notwithstanding here was a true debt due to Twyne, and a good con- "sideration of the gift, yet it was not within the proviso of the said act "of 13 Eliz., by which it was provided that the said act shall not ex- "tend to any estate or interest in the lands, &c., goods chattels, made "on a good consideration and *bona fide*, for although it is on a true and "good consideration yet it is not *bona fide*, for no gift shall be deemed to "be *bona fide*, within the said provision which is accompanied with any "trust," &c. 1 Smith Leading Cases, p. 1, and notes.

In *Pickstock vs. Lyster*, 3 *Maul and Sel.*, 317, an assignment was upheld, the court saying: "*This was not a deed by which the party stipulated for any benefit to himself*, but all the property of the party is to be distributed among his creditors including this creditor." In Holbird vs. Anderson, 5 T. R., 235, the court, Lord Kenyon says:

"There was no fraud in this case, the plaintiff was preferred by his debtor Charter, *not with a view of any benefit of the latter* but merely to secure a just debt."

Conveyances to secure future benefit support or maintenance are void.

Crane vs. Stickles, 15 Vert., 252.
Jones vs. Spear, 21 Vert., 426.

The slightest trust reserved in favor of the grantor is fraud upon creditors.

Colburn vs. Pickering, 3 N.H., 415.
Russell vs. Hammond, 1 Atkins, 16.
Mackie vs. Cairnes, 5 Cow. 556.
Barnes vs. Griffin, 2 Cow. 365.

This lease contained a provision as follows: "It is further mutually "agreed that the said 'Chamberlain' may, if it shall be found for the "interests of said company, *buy additional rolling stock*, and appropriate "the receipts of said railroad to the payment of the same." This provision alone would render the lease fraudulent as to creditors. Millions of dollars might have been expended, *if the interests of the company*, not its creditors required it.

In Owen et al. vs. Body. et al., 5 *A. & Ellis*, 28, a tavern-keeper made an assignment to trustee for the benefit of creditors, by which the assignee *was to continue the business of the debtor*, and apply the proceeds, to carry on the business, keep up the stock in trade, purchase horses and carriages, and pay the surplus of profits to creditors; and to this end assigned all his tavern stand and property. The assignment was held void. In Barnum vs. Hemstead, 7 Paige 568, it was held that an assignment, containing provision for future advances to the assignor, or for future liability which the assignee might assume for him, could not be sustained. The Chancellor said, "If I was satisfied that such "was a fair construction of the instrument, I should not hesitate for a "moment to declare it fraudulent and void upon that ground alone; as "such an attempt to secure a future credit and benefit to the assignors, "by means of the assigned property, to the prejudice of their present "creditors, could not be sustained in any court."

But the most pertinent authority is Bodly vs. Goodrich, 7 How., 276, approving the decision in Arthur v. The Bank, &c., 9 Smedes & M., 394, where a conveyance from a banking and railroad company was made to assignees, for the reason, as the assignment itself recited, "that an

" assignment of the property debts and effects of the said corporation " should at once be made for the benefit of its creditors, as will most " effectually promote the interest of the creditors of the institution, and " protect its debtors from loss and sacrifice; and at the same time fur- " nish means to finish and complete the railroad immediately, and to " protect and secure to the stockholders of the road the franchises gran- " ted by the charter." Exactly the motives Mr. Kilburn says actuated him in making the lease, and exactly the thing he attempted to accomplish.

The court say: "Upon its face this deed shows an intention by the " bank to postpone its creditors, use the effects of the bank, for the com- " pletion of the railroad, pay the trustees enormous salaries, and make " no dividend among the creditors of the bank, until these objects were " accomplished. This was proposed to be done with the consent of " creditors, and if that consent had been given, there could be no objection " to the arrangement. The motive avowed to complete the railroad, the " greater part of which had been made, and by which an income would " be secured for the benefit of the creditors and the stockholders of the " bank, would have been legal and perhaps wise, had the creditors con- " sented. But the plaintiff in the judgment under which the property " claimed by the plaintiffs was sold, did not consent; consequently he " was not bound by the deed of assignment. It was fraudulent as against " him and all other creditors of the bank who did not become parties to " the deed."

It would be impossible ever to find two cases more nearly parallel than the one just quoted, and the one we are arguing. The motives the same, the means the same, the result the same. It is wholly immaterial by what instrumentality a corporation proposes to retain control of its property, and apply its earnings to the completion of its road, in defiance of creditors. It is the thing itself, and not the means of its accomplishment that the law forbids. If creditors could be compelled by this corporation to stand by while it applied its earnings to the completion of its road; it would be very little satisfaction to them to know that this fraudulent result was accomplished, not by a lease, but by a " Welsh Mortgage." It is the thing itself, and not the manner of its consummation that is a fraud upon them; and any cover or

device under which it is sought to be veiled will be swept away, and the rights of the creditors vindicated.

THIRD.—Where the whole transaction between the parties as it is embodied in writing shows the fraudulent intent: that is, where the thing contracted for is itself a fraud upon creditors; the question of fraud, though one of facts, is for the exclusive determination of the Court, and not for a jury, even in action at law; and both parties to the contract are charged with notice of, and are conclusively presumed to have participated in, the fraudulent intent.

Hutchinson vs. Lord, 1 Wis., 286.
Keep vs. Sanderson, 2 Wis., 42.

III.

Both lease and judgment are void having been given and confessed with intent, in fact, to hinder delay and defraud creditors.

The allegations of the bill, confessed by the demurrer are clear and conclusive on this point.

IV.

The only remaining question is, can a subsequent creditor set aside a conveyance actually fraudulent? This is clearly established by the authorities. Where the intent to defraud is clearly established in the making of the conveyance, the authorities are unanimous in holding that subsequent creditors may set it aside. Existing creditors are not *compelled* to do so, and may resort to and exhaust all the other property of the debtor; so that subsequent creditors would have a right to complain, if they could not in turn resort to the property fraudulently conveyed.

1 Story Eq., Sec. 361, "Where the conveyance is intentionally made "to defraud creditors, it seems perfectly reasonable that it should be "held void, as to all *subsequent* as well as all *prior* creditors, on "account of ill faith."

The doctrine of this court is, that a *mere* voluntary *bona fide* conveyance, by one not indebted at the time, is good against subsequent

creditors; *but a conveyance made with a fraudulent intent as against existing creditors may be impeached by subsequent creditors.*

Sexton vs. Wheaton, 8 Wheat., 250.
Hinde vs. Longworth, 11 Wheat., 211.
Reade vs. Livingston, 3 John., Ch. 481.

See also sustaining the principle that a conveyance made *with an actual fraudulent intent* may be set aside by a *subsequent* creditor:

Smith vs. Lovell, 6 N. H. 67.
Paul vs. Crocker, 8 N. H., 288.
Wadsworth vs. Havens, 3 Wend., 411.
Clark vs. French, 10 Shep., 221.
Damon vs. Bryant, 2 Pic., 411.
Tremble vs. Turner, 13 Smedes & M., 348.
1 Story Eq. Jur., Sec. 361 and notes.
Thompson vs. Dougherty, 12 S. & Rawl., 448.
Jacks vs. Turne, 3 Desaussure, 1.
Beach vs. Catlin, 4 Day., 284.

In 1 Am. Lead. cases, p. 56, the law upon this subject is stated as follows: "An intent actually to defraud creditors is to be legally "inferred from the grantors being insolvent at the time, *or greatly* "*embarrassed*, or so largely indebted that his conveyance necessarily "has the effect to hinder and defraud creditors, and a voluntary con- "veyance made under such cases may be set aside by a *subsequent* "creditor:" and the following among other cases are cited:

Gilmore vs. N. A. Land Co., 1 Pet., C. C., 464.
Ridgeway vs. Underwood, 1 Wash., 137.
Howe vs. Ward, 4 Green'l., 208.
Iley vs. Niswanger, 1 McCord, Ch. 518.
Henderson vs. Dodd, 1 Bailey Eq., 140.
Taylor vs. Ex. of Heriot, 4 Desaussure, 222.
Smith vs. Gear, 3 Humph., 121.
Morgan vs. McClelland, 3 Dev., 82.
Doyle vs. Sleeper, 1 Dana., 531.

In McConnihe vs. Sawyer, 12 N. H., 403, the Court says: "That "*subsequent* creditors may take advantage of the fraud, and avoid the "conveyance, is a principle stated in Smith vs. Lovett, 6 N. H., 67, "and in Paul vs. Crocker, 8 N. H. 290; *and is so generally the*

" *received doctrine, both in England and the United States, as to be* " *no longer an open question.*

See also Harrison vs. Cramer, 3 Clark, (Iowa) 543.

2. A sale or conveyance made to defraud creditors is void as to a subsequent purchaser for valuable consideration, *even with notice.*

1 Am. Lead. Cases, 61.
Ricker vs. Ham, 14 Mass., 137.
Clapp vs. Leatherbee, 18 Pick., 131.
Clapp vs. Tyrrell, 10 Pick., 247.
Lewis vs. Love's Heirs, 2 B. Mon., 347.
Mason et. al. vs. Baker, 1 Marshall, 210.
Verplank vs. Sterry, 12 John., 536.
Hudnall vs. Wilder, 4 M. McCord, 295.

MATT. H. CARPENTER,

Counsel for Appellant.